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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	3:73-cv-00127-MMD-WGC **PRINCIPAL DEFENDANTS' OPPOSITION TO THE UNITED STATES' AND WALKER RIVER PAIUTE TRIBE'S JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT**

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PREFACE

At the outset, the Principal Defendants explain the manner in which the exhibits, both those filed in support of this Opposition and those filed by the Plaintiffs in their Motion, are referenced in this Opposition. Under separate cover, the Principal Defendants have filed a 4 volume Appendix with 65 exhibits in support of this Opposition. Those exhibits have been bates numbered from pages 00001 to 00635. References to those exhibits will be by Appendix volume number, exhibit number and page number. For example, "Ax., Vol. I, Exh. 5 at 1-10" refers to Exhibit 5 in Volume I of the Appendix at those pages. The pages in the Appendices are numbered consecutively. Each appendix includes an index for all of the Exhibits, their description, the appendix volume in which they are located, and their page numbers.

At times in this Opposition, the Principal Defendants will refer the Court to exhibits Plaintiffs filed in support of their Motion, primarily the Transcript of Record on Appeal to the Ninth Circuit in the original litigation. All of the Plaintiffs' exhibits are filed in the docket under ECF 2638. The Transcript of Record on Appeal is referred to in Plaintiffs' Motion as Exhibit 2. In the Court's docket under ECF 2638, Exhibit 2 is encompassed within Documents 6 through 11. The entire Transcript of Record on Appeal includes Bates Nos. US0035366 through US0036420. Documents 6 through 11 therein are as follows:

Doc. No.:	**Bates Page Numbers:**
Doc. 6	US0035366 – US0035565
Doc. 7	US0035566 – US0035765
Doc. 8	US0035766 – US0035892
Doc. 9	US0035893 – US0036092
Doc. 10	US0036093 – US0036292
Doc. 11	US0036293 – US0036420

The Transcript of Record on Appeal includes bates numbers, as well as internal page numbers. The page references in this Opposition will be to the bates numbers. For example, a reference to

"Doc. 6 at US0035391" will be a reference to Doc. 6 under ECF 2638 at that bates numbered page, which is the first page of the United States' Amended Bill of Complaint in that Transcript of Record on Appeal.

I. INTRODUCTION.

A. The Motion and the Affirmative Defenses at Issue.

The United States and the Walker River Paiute Tribe ("Tribe") (collectively, "Plaintiffs") have moved for partial summary judgment (the "MPSJ") (ECF 2638) with respect to certain affirmative defenses asserted in the Principal Defendants' answers.[1] They contend that, as to four affirmative defenses, there is no genuine issue of material fact, and that they are entitled to judgment as a matter of law denying those defenses. MPSJ (ECF 2638) at 1. The MPSJ describes those defenses as "(1) finality and repose; (2) that the Tribe cannot have a groundwater right in addition to a surface water right; (3) that the Act of June 22, 1936 precludes additional federal reserved water rights; and (4) that a federal reserved right for the lands added to the Reservation after 1924 does not exist if the purpose of those lands can be satisfied with the Tribe's surface water right to 26.25 cubic feet per second ("CFS") that was previously decreed for other Reservation Lands." MPSJ (ECF 2638) at 3.

In order to explain how and why the relevant affirmative defenses apply here, it is necessary to provide an explanation of the claims being made by the Plaintiffs. For that purpose, the Principal Defendants refer to the United States' Detailed Statement of Water Right Claims on Behalf of the Walker River Paiute Indian Tribe (the "Detailed Statement") filed herein on May 3, 2019 as ECF

[1] Here, the "Principal Defendants" are the Walker River Irrigation District, Desert Pearl Farms, LLC, Peri Family Ranch, LLC, Peri & Peri, LLC, and Frade Ranches, Inc., Lyon County and Centennial Livestock, the Nevada Department of Wildlife, the Schroeder Group, and Mono County.

2476. In some cases, it is also necessary to explain the affirmative defenses themselves because Plaintiffs have mischaracterized them.

B. The Claims Being Made Here.

1. Weber Reservoir.

Under the "implied reservation of water doctrine,"[2] Plaintiffs seek a surface water right from the Walker River with an April 15, 1936 priority date to store water in Weber Reservoir at any time there are flows available under that priority date and there is space available in the 13,000 acre foot reservoir, and the right to carry over that stored water from year to year. Detailed Statement (ECF 2476) at 6. The Plaintiffs propose to use this stored water to irrigate 2,100 acres presently recognized by the Walker River Decree (the "Decree") as having an 1859 water right from the Walker River, which land is within the Walker River Indian Reservation (the "Reservation") as it existed in 1859 and during the original litigation, to irrigate 2,800 acres of what is referred to as non-Walker River Indian Irrigation Project ("WRIIP") pasture, which land receives water through WRIIP facilities to irrigate 1,056 acres of pasture land. Detailed Statement (ECF 2476) at 5-6.

2. Restored or Added Lands.

Over the years, land has been withdrawn or set aside for the use of the Indians and/or added to the Reservation. The Plaintiffs refer to those lands as "Restored or Added Lands." Initially, we describe those lands and then the claims being made for them.

a. 1918 and 1924/1928 Lands.

In 1918, before the water litigation was filed, President Woodrow Wilson issued Executive Order No. 2820 setting aside 34,000 acres as a "grazing reservation" for Indians of the Walker

[2] The "implied reservation of water doctrine" is explained at pgs. 8-10, *infra.*

River Reservation. *See*, Detailed Statement (ECF 2476) at 7. This land was not contiguous to the Reservation as it existed at that time, and the Walker River did not and does not run through it. *See*, MPSJ (ECF 2638-3).

By Executive Order No. 4041 of June 27, 1924, President Coolidge withdrew approximately 69,000 acres of land "for the use and benefit of the Indians of the Walker River Reservation." The withdrawal was subject to enactment by Congress of an act permanently withdrawing the lands and providing that the temporary withdrawal did not affect existing legal rights. Pursuant to the Act of March 3, 1928, 45 Stat. 160, Congress confirmed that withdrawal. Detailed Statement at 12. The initial withdrawal occurred before the water litigation was commenced and was made permanent shortly before the taking of testimony and evidence began. This land was contiguous to the 1918 land, but was not contiguous to the Reservation, and the Walker River did not and does not run through it. *See*, MPSJ (ECF 2638-3).

b. Lands Added Under the 1936 Act of Congress.

In 1936, Congress authorized the Secretary of the Interior to set aside a maximum of 171,200 acres of public lands as an "addition" to the Reservation. *See*, Act of June 22, 1936, 49 Stat. 1806. The Act provided that the addition was not to affect valid legal rights. Existing stock drive ways used by others were also to be maintained. The Act also reserved title to all minerals in the United States, and made them subject to all forms of mineral entry or claim under the Public Land Mining Laws. The Act also required a payment of $.05 per acre to the Tribe for any land lost by use or occupancy as a result of mineral entry or mining.

The Senate Report for the 1936 legislation included a letter from the then Secretary of the Interior, Harold L. Ickes. The letter stated that, with the exception of about "1,440 acres of woodland," the remainder of the lands, about "169,700 acres . . . surround [the Indians] grazing reserve, is desirable as an addition for grazing purposes. The lands are being utilized almost

exclusively by Indians. Their character and location make them valueless to any other group. The range value of the land is so low, it takes from 150 to 200 acres per head per year." Senate Report No. 1750 to Accompany S. 3805, April 7, 1936. In 1972, the Secretary exercised the authority under the 1936 Act to add 2,900 acres to the Reservation. Detailed Statement at 7, n. 17. As is illustrated by Exhibit C to the MPSJ, these 1936 lands did surround the 1918 and 1924/1928 lands. Although some of them were contiguous to the Reservation as it existed at that time, the Walker River did not and does not run through them. *See*, MPSJ (ECF 2638-3).

c. The Claims for the Added or Restored Lands.

Through their Second Amended Counterclaims, Plaintiffs are seeking implied reserved water rights for lands which were withdrawn for the Indians of the Walker River Reservation in 1918, 1924/1928 and lands added to the Reservation in 1936 and 1972. With respect to the lands withdrawn in 1918 and 1924/1928 they seek rights to springs and groundwater to water livestock with unspecified priority dates. *See*, Detailed Statement (ECF 2476) at 9-10; Claim Summary at 13.

Plaintiffs claim implied reserved groundwater rights with a priority date of September 25, 1936 for the lands added in 1936 to water livestock and also to irrigate 1,500 acres of those added lands. *See*, Detailed Statement (ECF 2476) at 8; Claim Summary at 13.

3. Claims for the 1859 Reservation.

Plaintiffs also claim an implied reserved water right to groundwater for domestic, commercial, municipal and industrial purposes for lands within the Reservation since 1859 and with an 1859 priority. In addition, they claim a similar implied reserved groundwater right with the same priority to irrigate another 1,238 acres of land alleged to have been within the Reservation since 1859 with an 1859 priority. Detailed Statement (ECF 2476) at 10-11; Claim Summary at 13. Finally, Plaintiffs claim implied reserved water rights to water livestock from 10 wells and 6

springs with an 1859 priority date for lands within the 1859 Reservation. Detailed Statement (ECF 2476) at 12, Claim Summary at 13.

4. Summary.

In the 1924 Water Litigation, the United States sought a water right under the "implied reservation of water doctrine" for the Reservation to irrigate all of the land susceptible of irrigation and for domestic and other uses on it in the amount of 150 cubic feet per second with an 1859 priority. If the Plaintiffs are successful here, the Decree would be modified so that the land on the Reservation irrigated with an implied reserved water right from Walker River, now 2,100 acres, would be expanded to 5,956 acres, including the 2,100 acres, by use of water stored in Weber Reservoir. In addition, the land on the Reservation to be irrigated with groundwater would include 1,238 acres with an 1859 priority, and 1,500 acres with a 1936 priority. The total land to be irrigated from all sources would be 8,694 acres, approaching the 10,000 acres the United States asserted were susceptible of irrigation in the 1924 litigation. In addition, there would be additional rights from surface and groundwater for watering livestock and for domestic use, some with 1859 priority dates.

C. The Defenses at Issue.[3]

Under the Third Affirmative Defense, finality and repose, the Principal Defendants contend that general principles of finality and repose that apply to water rights decrees, *Arizona v. California*, 460 U.S. 605,619 (1983), preclude the Decree here from being construed as authorizing its modification to recognize the additional reserved water rights that are claimed for Weber Reservoir, for the 1918 and 1924/1928 lands and for the lands which are said to have been part of the Reservation since 1859, whether from groundwater or surface water. The Principal Defendants

[3] In this Opposition, for examples of the relevant affirmative defenses, the Principal Defendants refer to the Answer of the District (ECF 2524).

do not contend that the finality and repose defense applies to the claims being made from groundwater for the 1936 lands.

The Seventh Affirmative Defense concerning the implied reservation of additional water in connection with lands either added to the Reservation or made available to the Tribe also raise a question of law and fact. That defense asserts that a federal reserved water right exists only if "necessary" to fulfill the *primary* purposes of the federal reserved lands, *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978), and only to the extent necessary to meet the "minimal need" of the federal reservation, and "no more." *Cappaert v. United States*, 426 U.S. 200, 141 (1976). Here, the United States has failed to allege or show that the water granted to the United States in the Walker River Decree is insufficient to meet the primary purposes for which the lands were added to the Walker River Indian Reservation, and that the additional water from any source is "necessary" to fulfill the primary purposes of such added lands. This defense relates to claims for stock water on the 1918 and 1924/1928 lands. The Principal Defendants do not contend that it applies to the 1936 lands.

The Twelfth Affirmative Defense directed at the implied reservation of groundwater is specific to the circumstances of this case. That defense asserts that a federal reservation has a single claim for an implied reserved water right which may be satisfied in whole or in part from surface water and/or groundwater. However, once a Reservation's implied reserved water right has been quantified from a surface water source, it cannot be enlarged by asserting a separate implied reserved claim for groundwater, and vice versa. *See, e.g.*, ECF 2524 at 7. That defense raises a question of law concerning the implied reservation of water doctrine and a question of law and fact as to whether finality and repose bar some or all of the claims for groundwater here as a result of the litigation in this matter from 1924 to 1939. That defense relates to the claims being

made for groundwater for lands the Plaintiffs contend were originally reserved in and continuously held for the Tribe since 1859.

The Fourteenth Affirmative Defense is related to the Thirteenth Affirmative Defense, which Principal Defendants conceded was inadequate as a matter of law in connection with the Motion for Judgment on the Pleadings. *See*, Order (ECF 2626) at 9. Similarly here, the Principal Defendants concede that the Act of June 22, 1936 does not preclude additional federal reserved rights. However, they do contend that the addition of lands to the Reservation pursuant to that Act did not result in the implied reservation of water for purposes of irrigation, an issue not addressed by the MPSJ.

D. The Context of the 1924 Litigation.

Before explaining why the facts and law here require the Court to deny the Motion for Partial Summary Judgment, it is important to place the original litigation, which took place from 1924 until the Decree was amended in 1940 to conform to the decision in *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), in the context of that time period. In 1924 and now, there were and are only two ways for the United States to obtain a water right. One was and is under the "implied reservation of water doctrine," and the other was and is under state law.

The 1908 case of *Winters v. United States*, 207 U.S. 564 (1908) gave birth to the implied reservation of water doctrine which is often referred to as the "Winters Doctrine." As that doctrine evolved over the last century, it has come to stand for the proposition that when the United States reserves land for a specific purpose, like an Indian reservation or another federal enclave, the government "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see also, United States v. New Mexico*, 438 U.S. 696, 700-705 (1978); *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Winters v. United States*, 207 U.S. 564 (1908); *Colville*

Confederated Tribes v. Walton, 647 F.2d 42, 46-47 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983). In *Winters*, the reservation had been established by a treaty with the Indians. As is apparent from the historic documents and the decisions in this case, the defendants contended that the Winters Doctrine did not apply to reservations established by executive order. They argued that any rights of the United States for the Walker River Reservation had to be established under state law.

There were and are important differences between water rights established under the implied reservation of water doctrine and those established under state law. Those differences are helpful in understanding what the United States litigated from 1924 to 1939. We summarize those differences here. First, implied reserved water rights are established by reason of the fact that land has been reserved by the United States and that the primary purpose of the reservation cannot be fulfilled without water. In contrast, appropriative water rights are established under state law by the actual application of water to a recognized beneficial use. Since 1905, a permit from the Nevada State Engineer has been required before diverting and using water. *See*, N.R.S. 533.325. An implied reserved water right exists even if it has not been applied to a beneficial use and without any need for a permit from a state.

The priority date of an implied federal reserved right and the right itself vests no later than the date of establishment of the reservation. *United States v. New Mexico*, 438 U.S. 696, 705-11 (1978). Under the prior appropriation doctrine, the priority date of a water right is the date the first steps are taken to apply it to beneficial use, provided that thereafter the water is actually placed to beneficial use with reasonable diligence. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869).

The quantity of a federal reserved water right does not depend upon beneficial use, but upon the amount of water reasonably necessary to fulfill the primary purpose of the reservation.

Quantification is often a difficult and hotly contested issue in reserved water right cases. Under the prior appropriation doctrine, a water right is quantified and limited by actual beneficial use. *See*, N.R.S. §§ 533.035 and 533.045.

Once established, the validity and existence of an implied federal reserved right does not depend on use or continuous use. In contrast, surface water rights under Nevada law may be lost by abandonment, and groundwater rights may be lost by forfeiture. *See*, N.R.S. § 533.060; N.R.S. 534.090; *In Re Manse Spring and Its Tributaries*, 60 Nev. 280, 108 P.2d 311 (1940); *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993).

When the United States initiated this litigation in 1924, it sought recognition of an implied reserved water right for the Reservation. It sought to quantify that right as 150 cfs with an 1859 priority based upon all of the irrigable land on the Reservation, about 10,000 acres, even though, at the time, most of that land had not been irrigated, might never be irrigated, and the improvements needed to irrigate all of it did not yet exist.[4] The United States sought sufficient water to meet the then present and future needs of the Reservation, including for irrigation and domestic and other uses, unconstrained by the requirements of state law for a permit, or to divert or actually use the water, and without any need for Congressional appropriations to actually implement any irrigation on the reservation. In its "Further Particulars," the United States alleged that "not less than one hundred fifty-second feet of the flow of said river delivered at the headgates and diversion dams, now or hereafter to be constructed upon said Reservation, is necessary for the irrigation of the lands now irrigated and capable of irrigation thereon." Doc. 6 at US0035407. [Emphasis added].

It is also important to understand the difference under state law between a water right for direct irrigation and a water right for storage. Kinney, in his treatise, Law of Irrigation and Water

[4] Although the original Complaint referenced 11,000 acres, throughout the litigation, the United States referred to 10,000 acres susceptible of irrigation.

Rights, published in 1912, described "direct irrigation" as the "diversion and carriage of water by means of canal, flumes, or some other conveyance, and the application of the water to the land in practically one and the same operation." 2 Kinney at 844, p. 1479 (2d Ed. 1912). He described "storage" as "the temporary accumulation, conservation, or the storage of water for future use, as distinguished from either "direct irrigation" or "immediate use." *Id.* at 1480. He noted that stored water could come from two sources, the heavy flows in the spring or winter months, and also from the normal flow of a stream. *Id.* He said "storage is merely an incident of the means of making the use occurring between the diversion and the application." *Id.* Under Nevada law, separate permits are needed to first store the water and then to use it beneficially. See, N.R.S. 533.440. A permit is needed before construction of a dam. N.R.S. 535.010. Those distinctions, which are relevant under state law, are irrelevant under the implied reservation of water doctrine. Once a Winters Doctrine right is recognized, it may be used directly, regulated or stored as the United States determines in its discretion.

Finally, when this litigation took place from 1924 to 1939 (and perhaps even for some time thereafter), all of the parties were of the view that all Walker River water which reached the Reservation would be available for use on it. They essentially regarded any water reaching Walker Lake as being wasted. That is no longer the case and hasn't been for many decades. *See, e.g., Mineral County v. Nev. Dept. of Cons. & Nat. Res.*, 20 P.3d 800 (Nev. 2001); *Mineral County v. Walker River Irrig. Dist.*, 900 F.3d 1027 (9th Cir. 2018); *Mineral County v. Lyon County*, 136 Nev. Adv. Op. 58 (2020); Nev. State Engineer Permit No. 25792; Cert. No. 10860.

II. STATEMENT OF FACTS MATERIAL TO THE DISPOSITION OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. Introduction.

In their Joint Motion for Partial Summary Judgment, the United States and the Tribe argue that their claims for an additional implied reserved water right for Weber Reservoir and for groundwater are not barred by principles of finality and repose as those principles were described by the Supreme Court in *Arizona v. California*, 460 U.S. 605, 619 (1983) ("*Arizona II*"), because "the parties did not litigate storage water rights associated with Weber Reservoir" and "they did not litigate groundwater rights."[5] MPSJ at 21, lns. 2-3 (ECF 2638-1). In asserting that there are no genuine issues of material fact, Plaintiffs narrowly describe the claim that was litigated from 1924 to 1939 as "the Tribe's surface water right to irrigate 10,000 acres of the Walker River Indian Reservation within the Reservation's permanent boundaries as they existed in 1924 from the direct, uninterrupted, natural flows of the Walker River." MPSJ Attachment B, para. 1 (ECF 2638-2). In support of their position, Plaintiffs refer the Court broadly to only a few of the more than 60,000 pages of documents that have been produced thus far in this litigation.

In this present litigation, the Plaintiffs seek a water right to store water in Weber Reservoir and for groundwater under the implied reservation of water doctrine to irrigate land within the boundaries of the Reservation as it existed in 1924 for some of the very same lands for which the United States sought a water right in the original litigation and/or for land the United States did not contend was irrigable in that original litigation.[6] As we establish below, for purposes of applying finality and repose based upon *Arizona II*, the law is informed by the same principles which are used for that purpose when applying the technical rules of claim preclusion. Those

[5] Plaintiffs accuse the Principal Defendants of seeking to "delay or block" this litigation at "every turn by drawing out service of process over nearly two decades and asserting legally inapplicable affirmative defenses." MPSJ at 2. The affirmative defenses are asserted in good faith and in compliance with FRCP, Rule 11. The speed with which process was served was wholly the decision of the United States, not the Principal Defendants.

[6] This statement is not intended to include or refer to the claim being made to irrigate with groundwater the 1,500 acres of land added to the Reservation in 1936.

principles include the criteria used to identify the previously litigated claim, what could have been litigated in the previous litigation, and the claim being asserted for purposes of applying those rules. Under those principles, the "claim" that was actually litigated here from 1924 to 1939 was the United States' entire water right under the implied reservation of water doctrine for the Reservation quantified by all of the irrigable land on the Reservation to meet both its then present and its future needs, including for irrigation and domestic and stock water uses.

The undisputed facts show that the United States intended to assert and did assert a claim for the entire implied reserved water right for the Reservation. They show that, although the United States could have asserted claims to groundwater, the United States considered and rejected groundwater and Walker Lake as a source for that water. Instead, it selected the Walker River as the "sole source" of that water. They show that the United States recognized that it could assert the entire implied reserved claim without facilities built or funded to actually put the water it sought to actual use. They show that Interior Department and Justice Department officials were of the opinion that once an implied reserved water right was recognized for the Reservation, the United States could, if it chose, use it directly, regulate it with and/or store it in a reservoir.

The undisputed facts also show that, although the United States had been considering the need for a reservoir on the Reservation since 1899, it recognized throughout, including during the litigation, that a reservoir without a recognized water right for the Reservation would be of no use. From the outset, and even as Weber Reservoir was being built, the United States pursued the full right for the Reservation under the implied reservation of water doctrine under the correct assumption that once that implied reserved water right was established, it could regulate or store water pursuant to that right in Weber Reservoir, an enlarged Weber Reservoir, or another reservoir if it chose to do so. Moreover, it was the position of the United States throughout the litigation

that the water right it sought, a first right of 150 cfs, was sufficient to meet the needs of the Reservation without the need for storage.

The undisputed facts show that it was only after the United States did not receive the implied reserved water right it was seeking, 150 cfs with an 1859 priority quantified by all of the irrigable acres, that it became concerned about a separate "storage" water right for Weber Reservoir. Even though it considered seeking a water right under state law for Weber Reservoir at that time, it never did. Instead, it waited until now, after the circumstances upstream of the Reservation and downstream at Walker Lake have changed significantly, to assert a right for Weber Reservoir based upon the implied reservation of water doctrine. As is discussed below, the mere construction of a facility, like Weber, does not result in a water right under the implied reservation of water doctrine, and in any event, the claim is barred by the principles of finality and repose set forth in *Arizona II*.

The undisputed facts show that the United States sought and received a right to water for domestic and stock water purposes in the Decree. Those facts also show that to the extent the claims asserted here for the 1918 and 1924/1928 lands were not asserted, they certainly could have been asserted. The 1918 lands were included in the 86,400 acres referenced in the 1924 Complaint.

For purposes of determining whether there are genuine issues of "material" fact here, it is important to identify the facts which are "material." Substantive law defines what are material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts which might affect the outcome of the suit under governing law are "material." *Id.*

Here, facts which bar a claim being made under the principles of finality and repose in *Arizona II*, 460 U.S. 605 (1983), are material. Although the Plaintiffs and Defendants have a disagreement over whether those principles bar a "claim" that "could have been made," there is no disagreement over the fact that they bar the "claim" that "was made." Thus, facts related to the

substantive law requirements for establishing an implied reserved water right under the Winters Doctrine are material here, as are the facts which define the "claim" that was in fact made for purposes of *Arizona II*. Finally, facts that show what "claims could have been made" are also material.

The material facts which are set forth below, which the Principal Defendants contend are undisputed, are the facts necessary to support a claim for an implied reserved water right, which define the claim that was asserted from 1924 to 1939, and the claim which could have been asserted. They show that, at the very least, there are genuine issues of material fact as to whether the claims being litigated here, for water from the Walker River to store in Weber Reservoir and for groundwater for the Reservation as it existed at the time, and for the 1918 and 1924/1928 lands were or could have been litigated in the 1924 to 1939 litigation.

Those facts address the substantive law requirements for establishment of the relevant implied reserved water right here: (1) the reservation of land by the United States for a federal purpose, (2) an intent at the time of land reservation, to reserve unappropriated water to accomplish the purpose of the reservation, and (3) necessity, *i.e.*, that water is needed to fulfill the primary purpose of the land reservation. *Cappaert*, 426 U.S. at 138 (1976). They also address what claim was in fact litigated and/or could have been litigated from 1924 to 1939.

The only facts which establish an implied reserved water right for the Reservation as it existed during the litigation are those which occurred in 1859, 1918, 1924 and 1928. There are no facts which establish an additional water right for Weber Reservoir under the substantive law, either before, during, or after the litigation. The facts show that the claim which was litigated from 1924 to 1939 was the sole claim for the entire implied reserved water right for the Reservation. The facts also show that if there is some separate implied reserved water right for Weber Reservoir, it could have been, but intentionally was not, litigated by the United States. The facts show that

the United States was of the view that a reservoir like Weber could be built at any time for the regulation and proper use of any implied reserved water right it was awarded, and that if Weber Reservoir was not large enough to do that, it could be enlarged or a larger reservoir could be built later. They show that there was no new reservation of land for purposes of building Weber Reservoir. There was no separate act of Congress to fund its construction, rather, advantage was taken of broad Depression era funding under the National Industrial Recovery Act to put people to work.

The facts show if there is some separate implied reserved water right for groundwater, it could have been, but was intentionally not, litigated by the United States because the United States had rejected groundwater as a source for the Reservation's implied reserved water right. The facts also show that the 1918 lands and the 1924/1928 lands were simply withdrawn for grazing use of the Indians, were not contiguous to the Reservation, and the Walker River was not and is not appurtenant to them. Nonetheless, the United States could have sought the water rights for those lands which it seeks here. That is certainly the case if it contends the Decree must be modified to recognize those rights.

The facts from which the foregoing ultimate conclusions are drawn, and which at the very least establish a genuine dispute as to the conclusions Plaintiffs ask the Court to reach, are as follows.

B. Factual Statement

1. The Establishment and Allotment of the Reservation.

1. The Reservation was set aside in 1859, and was confirmed by Executive Order in 1874. Ax., Vol. I, Exh. 1 at 3.

2. The passage of the Dawes Act in 1887 established a federal policy to divide reservation land into individual Indian owned allotments and thereafter to open and sell the unallotted lands to settlers. Ax., Vol. I, Exh. 2 at 6-9.

3. After passage of the Dawes Act, but before the Reservation was reduced in size, several Interior officials urged that the irrigable lands on the Walker River Reservation be identified, surveyed and allotted. Ax., Vol. I, Exh. 3 at 18; Exh. 4 at 25-28.

4. In June of 1900, Frank Conser, Superintendent of Indian Schools, reported that there were possibly 8,000 to 12,000 acres which could be covered by ditch, and recommended to the Commissioner of Indian Affairs that the mineral lands on the Reservation be sold, and the proceeds utilized for construction of a storage reservoir, irrigating ditches, purchase of cattle and farm implements, etc. Ax., Vol. I, Exh. 5 at 33-38.

5. An Act of 1902 directed the Secretary to allot the land on the Reservation susceptible of irrigation by present ditches or extensions thereof into 20 acres parcels. Ax., Vol. I, Exh. 6 at 41-42.

6. In 1905, the Acting Commissioner of Indian Affairs directed James R. Meskimons to study the irrigation issues on the Reservation and to determine which lands were currently irrigable or susceptible of irrigation. Ax., Vol. I, Exh. 7 at 44-53.

7. In addition, the Acting Commissioner of Indian Affairs had instructed a special allotting agent to work with Meskimons and to make allotments to the Indians. Ax., Vol. I, Exh. 8 at 55-60.

8. Meskimons made his report in January of 1906 concerning the irrigation of 10,000 acres and reported on three sources of water supply, the Walker River, Walker Lake and groundwater wells. He recommended groundwater wells. Ax., Vol. I, Exh. 9 at 62-67.

9. Later, the United States concluded that pumping groundwater and pumping from Walker Lake would not be practicable because of the cost to pump the water. Ax., Vol. I, Exh. 10 at 70; Exh. 11 at 74.

10. The allotments were completed, and on July 20, 1906, the Indians ceded 268,000 acres to the United States. These lands were opened for entry by Presidential Proclamation dated October 29, 1906. The Reservation was left with 51,000 acres, 10,000 acres for irrigation and allotment, and 280 acres for the agency, a school and church. Ax., Vol. I, Exhs. 12-15 at 79-100.

11. Numerous studies were undertaken and reports made by the United States for construction of a storage reservoir on the Reservation from 1899 through 1926. Ax., Vol. II, Exh. 16 at 135; 156-157.

12. The Proposed Weber Dam and Reservoir site was mapped by Fred Weber in 1914. Ax., Vol. II, Exh. 17 at 234-235.

13. By Executive Order No. 2820, in 1918, President Woodrow Wilson set aside 34,000 acres as a grazing reservation for the Indians of the Walker River Reservation. The 34,000 acres were not contiguous to the Reservation, and the Walker River did not run through them. Ax., Vol. II, Exh. 18 at 237-240; MPSJ (ECF 2638-3).

14. By Executive Order No. 4041 of June 27, 1924 and Executive Order No. 4127, President Coolidge withdrew approximately 69,000 acres of land for the use and benefit of the Indians of the Reservation. The withdrawal was subject to enactment by Congress of an act permanently withdrawing the lands and providing that the temporary withdrawal did not affect existing legal rights. This land was contiguous to the 1918 land, but was not contiguous to the Reservation, and the Walker River did not and does not run through it. These lands were

"withdrawn for the use and benefit of the Indians of the Walker River Reservation." Ax., Vol. II, Exh. 18 at 237-240; MPSJ (ECF 2638-3).

2. The Commencement of the Litigation.

15. The United States filed its initial Complaint in this matter on July 3, 1924, alleging the Reservation consisted of 86,400 acres and that, as a result of establishing the Reservation, it had reserved and set aside sufficient water (150 cfs) to irrigate approximately 11,000 acres of land from the Walker River and for domestic and other uses on the Reservation with a priority date of 1859. Ax., Vol. II, Exh. 19 at 242-250.

16. The Complaint alleged that the Walker River ran through the Reservation and that there was no other source of supply of water for the Reservation. Ax., Vol. II, Exh. 19 at 246.

17. Because the Reservation had not received water since June 15, 1924, at the same time as it filed its Complaint, the United States sought a temporary restraining order to enjoin upstream water users from interfering with the flow of water to the Reservation. The request for a restraining order was resolved by a stipulation for the release of water for the benefit of the Reservation. Ax., Vol. II, Exh. 16 at 151.

18. Following the filing of the litigation, the United States continued to investigate on-Reservation storage options. Ax., Vol. II, Exh. 20 at 253.

3. Initial Efforts at Settlement.

19. The defendants in the litigation, particularly the Walker River Irrigation District, recognized that if the United States was awarded the first right on the Walker River for 150 cubic feet per second with an 1859 priority to irrigate 10,000 acres of land and for other uses on the Reservation, the upstream water users would be seriously adversely affected, and as a result, the District and others suggested that the better alternative for irrigation on the Reservation was

for the United States to construct a reservoir on the Reservation to capture and store flows that would otherwise flow to Walker Lake. Ax., Vol. II, Exh. 21 at 255-256.

20. Meetings were held with Nevada's and California's senators, representatives in Congress, the Secretary of the Interior and the Attorney General of the United States. Ax., Vol. II, Exh. 22 at 258-308.

21. Legislation was introduced in 1926 proposing to authorize funds for the purpose of constructing a dam at Schurz Canyon on the Walker River in Nevada to provide for irrigation of lands allotted to the Indians on the Reservation, and providing that when Congress approved the legislation, the United States would dismiss the litigation related to the rights of water users on the Walker River. Ax., Vol. III, Exh. 23 at 310-350.

22. As finally enacted, the 1926 legislation (the "1926 Act") appropriated $10,000 to undertake a study to "determine if there is a feasible reservoir site, or sites," on the Reservation. It did not, however, require the dismissal of the litigation. Ax., Vol. III, Exh. 24 at 353.

23. The United States filed an Amended Complaint on March 19, 1926 with the same basic claims for the Reservation and continuing to allege there was no other source of water other than the Walker River and its tributaries. In that Amended Complaint, the United States recognized the Rickey Decree, and that it had determined the rights of the defendants as between each other, and that it would not disturb those rights as between themselves. Doc. 6 at US0035399.

24. Pursuant to the 1926 Act, W.E. Blomgren completed studies in 1926 and submitted a report recommending an on-Reservation reservoir. Ax., Vol. II, Exh. 16 at 103-232.

25. The so-called "Blomgren Report" was transmitted to the Commissioner of Indian Affairs by Supervising Engineer C.A. Engle, who recommended: "that water rights be adjudicated at the earliest possible date; that the entire river system be placed in charge of a water

commissioner appointed by the Federal Court, with instructions to require the installation of suitable weirs, headgates and measuring devices by all diverters; that a storage reservoir be created on Indian land of Walker River Indian Reservation by the construction of a dam at the Rio Vista site." Ax., Vol. II, Exh. 16 at 107-112.

26. On October 19, 1926, the United States filed its Further Particulars wherein it stated:

> That not less than thirty-second feet of water is required of the flow of the Walker River delivered at the [19] diversion dam throughout the irrigating season for the irrigation of the lands upon said Walker River Indian Reservation now cultivated and irrigated, and not less than one hundred fifty-second feet of the flow of said river delivered at the headgates and diversion dams, now or hereafter to be constructed upon said Reservation, is necessary for the irrigation of the lands now irrigated and capable of irrigation thereon; that the said water was reserved and appropriated by the plaintiff herein for the use of the Indians upon such Reservation by the acts and things hereinbefore set forth and by the continued use and occupation of said Reservation by the plaintiff for the benefit of the Pahute and other Indians thereon.

Doc. 6 at US0035407. [Emphasis added].

27. Settlement discussions resumed in 1927, and the Commissioner of Indian Affairs instructed Engle that any resolution needed to provide a first right for 10,000 acres of Indian lands, and that if a reservoir was constructed, it should be at no cost to the Indians. He said that without that requirement, the "prior and first right would be . . . relegated to a secondary right." Ax., Vol. III, Exh. 25 at 355-356.

28. In late 1927, before the matter was to go to trial in the spring of 1928, another round of settlement discussions took place. The proposal from the defendants was rejected by DOJ attorney Cole Harwood. Ax., Vol. III, Exh. 26 at 358-359.

29. The Superintendent of Irrigation agreed with Harwood's rejection, and recognized that a first right of storage was not one which the government could get as a direct result of the litigation. Ax., Vol. III, Exh. 27 at 361-363.

30. By an Act of March 3, 1928, 45 Stat. 160, Congress permanently withdrew 69,000 acres which had been withdrawn by President Coolidge for grazing by the Tribe in 1924. As noted, these lands were not contiguous to the Reservation, nor did or does the Walker River flow through them. Ax., Vol. III, Exh. 28 at 365.

4. The Trial Before the Special Master.

31. The trial before the Special Master commenced on March 22, 1928, and continued intermittently through July 24, 1931. Doc. 7 at US0035630-0035636.

32. During the trial before the Special Master, the United States presented the direct testimony of a number of witnesses, including John A. Beemer, a civil and irrigation engineer, who from 1918-1921 was employed by the Indian Service and lived on the Reservation. He was in charge of construction and rebuilding of works and the distribution of water. Doc. 10 at US0036228-0036265.

33. The United States also presented the direct testimony of E.W. Kronquist, who since 1919 had been the foreman in charge of irrigation on the Reservation. Doc. 9 at US0036009-0036059; Doc. 10 at US0036265 - Doc. 11 US0036306.

34. The United States also presented the direct testimony of J.C. Stevens, a consulting engineer from Portland, Oregon. Doc. 11 at US0036306-0036353.

35. Kronquist and Beemer testified concerning the extent and location of the "irrigable" acres on the Reservation. They testified about the irrigable acres on the Reservation. Those witnesses testified about the characteristics of the soils on those lands. Kronquist, Doc. 9, US0036004-36007; Beemer, Doc. 10, US0036228-36230.[7]

[7] The Transcript of Record on Appeal is something in the nature of an "Excerpt of the Record." It does not include a full transcript of all of the testimony presented. The Principal Defendants can provide the entire transcript of all testimony which consists of four volumes and 1,521 pages. PD000344-PD001874.

36. J.C. Stevens submitted a report to counsel for the United States on the "water supply of Walker River in relation to irrigation of lands within the Walker River Indian Reservation." He noted that "in determining the area practicable of irrigation within the available supply, the area in the reservation was placed at 10,700 acres." Ax., Vol. III, Exh. 29 at 367-409; *see* Exh. 29 at 371-372.

37. Both Kronquist and Stevens testified that with an 1859 first priority water right for 150 cfs, the United States could irrigate the 10,000 irrigable acres on the Reservation for which it was seeking an implied reserved water right, without the need for storage. Kronquist, Doc. 9 at US0036023-0036024; Stevens, Doc. 11 at US0036348.

38. During the trial, counsel for the defendants cross-examined Kronquist and Stevens concerning soils, irrigable land, the need for storage, and on whether there would be sufficient flow in the River to irrigate all 10,000 acres without storage. Kronquist, Doc. 9 at US0036018-0036024; Stevens, Doc. 11 at US0036346-0036348.

39. Counsel for the United States questioned the relevance of cross-examination concerning the need for storage, and asserted that the United States "was asking for the flow of the river and claiming the reservation of the water in the river, whether we use it in the reservoir or use it on the lands is something left entirely to the discretion of the government." Ax., Vol. III, Exh. 30 at 415-418; *see* Exh. 30 at 417.

40. Counsel for the defendants also cross-examined Kronquist and Stevens based upon statements made by Supervising Engineer C.A. Engle in a letter to the Commissioner of Indian Affairs dated February 14, 1927, in which he stated that the natural flow of the river with an 1859 priority would only be sufficient to irrigate 4,000 acres without a reservoir. Ax., Vol. II, Exh. 16 at 200-207; Kronquist, Doc. 9 at US0036024; Stevens, Doc. 11 at US0036348.

41. The cross-examination based upon Engle's 1927 letter resulted in efforts within the government to discredit it and disapprove it, including through a letter from the Assistant Secretary of the Interior to the Attorney General. Ax., Vol. III, Exhs. 31, 32 and 33 at 419-432.

42. The defendants presented their own witnesses who testified that there was not sufficient natural flow to irrigate 10,000 acres on the Reservation. Taylor, Doc. 9 at US0036074; Simpson, Doc. 10 at US0036210.

43. In 1929, before the trial was to recommence, the United States engaged in internal discussions about possible settlement. In a February, 1929 letter to the Commissioner of Indian Affairs, the Superintendent of Irrigation described the concepts that would be included in a stipulation as follows:

> I suggest that the final draft provide for the Indian Reservation being given a direct flow priority for a certain number of acres, with the water to be taken from the stream at the present reservation points of division. This, it seems to me, is and must be the fundamental right of the Government, and that it should be given and should be maintained no matter what may happen to the stream above caused by others.
>
> Then I think it proper to have the stipulation provide, as the draft of it does provide, for measurements at certain points and for such measurements controlling unless and until otherwise ordered by the court on a proper showing.
>
> Judge Harwood is doubtless right in saying that the Government may have a prior right of storage. The question there is partly at least, as to how far it is fair and wise to press the doctrine of reserve rights. I assume that we have enough in the case, in pleadings and proof, to support a decree giving the Government storage rights.
>
> A right to store 30,000 acre-feet at or near our proposed reservoir would be valuable and should be obtained if possible.
>
> It occurs to me that as a practical matter the defendants might be as willing to concede this storage for such a small amount and so far down the stream, as a first right, as they would to concede it as a secondary one. By doing this they might stand more chance of inducing the Government to build the reservoir. That solution, as far as the decree goes, would be more logical from the standpoint of our legal theory, and if satisfactory to the defendants would be better all around.

Ax., Vol. III, Exh. 34 at 434-436.

44. After a three-day internal conference involving the attorneys for the United States and the field officials of the Indian Bureau, a decision was made to not propose a settlement and to proceed with the trial. Ax., Vol. III, Exh. 35 at 438-441.

44. Near the end of 1930 and the beginning of 1931, the United States initiated steps to amend its Amended Complaint to no longer recognize the rights of the defendants which had been adjudicated in the *Rickey* litigation. Ax., Vol. III, Exh. 36 at 443-455.

5. Weber Reservoir.

46. In December of 1931, Indian Irrigation Service Engineer Gettelman submitted a report to the Director of Irrigation in Washington, D.C., recommending construction of the Weber Dam in the event of a favorable court decision. He also indicated that a larger reservoir could always be built later at the Rio Vista site. Ax., Vol. IV, Exh. 37 at 457-513; *see* Exh. 37 at 460; 502.

47. In February of 1932, the Special Master provided all of the attorneys with a copy of his tentative findings of fact and conclusions of law and tentative decree, and asked them to review it in advance of a March 3, 1932 session with him. Ax., Vol. IV, Exh. 38 at 515.

48. In that tentative report, the Special Master recommended to the court that there be decreed 25.21 second feet during the irrigation season of 180 days, April 1 to September 27 inclusive, for the irrigation of 2,000 acres of Reservation land. Ax., Vol. IV, Exh. 39 at 521-522.

49. The June 30, 1932 Annual Report of the Director of Irrigation for the Indian Service stated:

> By October 1, 1932, the federal court is expected to accept and enter as a decree the Master's finding of 25 second feet of water of the Walker River for the Indians; which appeal undoubtedly will be made asking for 150 second feet, such appeal is

> not expected to be settled for three years. The policy proposed, therefore, is to put in works on the basis of 25 second feet continuous flow plus flood waters, erect storage at Webber *(sic)* site sufficient to fully utilize this decreed water, and still leave the door open for enlarged storage in case the Supreme Court grants larger quantities of water.

Ax., Vol. IV, Exh. 40 at 541-542.

50. As a result of receiving that tentative information from the Special Master in October of 1932, a report was submitted to the Director of Irrigation at the U.S. Indian Service in Washington, D.C. The report was entitled "Water Available Under Special Master's Recommended Decree and Its Utilization." Ax., Vol. IV, Exh. 39 at 518-538.

51. The October, 1932 report concluded that if the United States received what it was seeking in the litigation, a first priority right of 150 cfs for 10,000 acres, it would be unnecessary to construct water storage on the Reservation. However, it concluded that if the decree as recommended by the Special Master was confirmed by the Court, a small reservoir would be required. It said that "it is the conclusion of many engineers who have studied the Walker River Reservation water supply problem that a small reservoir should now be constructed at the Weber site." Ax., Vol. IV, Exh. 39 at 534-536. The Weber site had been investigated and surveyed in 1914. Ax., Vol. IV, Exh. 41 at 544; Ax., Vol. II, Exh. 17 at 233-235.

52. On December 12, 1932, the Director of Irrigation for the Indian Irrigation Service advised as follows:

> For the purpose of regulating the flow of the Walker River at the intake of the irrigation canal, a reservoir is advised at Webber *(sic)* Dam Site. This is necessary for regulation of water in any case, whether it is water eventually decreed by a Federal Court released or sustained by upstream users, or return waters entering the reservation or uncontrolled flood rushes of the river.

Ax., Vol. IV, Exh. 42 at 546.

53. The Special Master submitted his Report in late December, 1932. Doc. 7 at US0035630-0035676.

54. On January 25, 1933, the Commissioner of Indian Affairs issued the following directive to the Director of Irrigation of the Indian Service:

> As determined at a conference in my office at which were present Superintendent Parrett, Mr. Dodd, Mr. Shipe and yourself, you will consider the following as the policy of the Indian Service on the Walker River Irrigation Project, Nevada:
>
> 1. The Service will ultimately ask for appropriations to develop regulatory storage of the Walker River for use on the Walker River Reservation to provide annual regulation of whatever waters are present in the river sufficient to serve the area of the Indian project now under constructed ditches and extensions thereof.
>
> 2. As the regulatory storage of the so-called Webber *(sic)* site, according to your presentation and memorandum or December 12, 1932, appears necessary for proper water service irrespective of the outcome of the pending litigation in Federal Court and is equally usable in regulating flood rushes regardless of the final outcome of that litigation, the proposal for this reservoir is for this purpose tentatively approved along the lines of your recommendation . . . .

Ax., Vol. IV, Exh. 43 at 548-549.

55. The Indian Service sought funding from the National Industrial Recovery Act to be used to construct Weber Reservoir. Ax., Vol. IV, Exh. 44 at 552. The National Industrial Recovery Act, P.L. No. 67, June 16, 1933, among other things, authorized the Executive Branch to "construct, finance, or aid in the construction or financing of any public works" as a means to "increasing employment quickly." P.L. No. 67, Sec. 203(a).

56. Eventually, the Indian Service received $137,000 in federal appropriations from the National Industrial Recovery Act and the Public Works Administration in 1933. Construction of Weber Reservoir began in 1933, and impoundment began thereafter. Construction was completed by 1937 with the installation of spill gates. *See*, Detailed Statement at 4-5; Ax., Vol. IV, Exh. 45 at 554-555.

57. As the construction of the reservoir became visible, the defendants in the adjudication became aware of it, and suggested opening the case to submit evidence about the reservoir. Ax., Vol. IV, Exh. 46 at 558.

58. The United States resisted that request out of concern that the information would jeopardize its claim for 150 cubic feet per second with an 1859 priority for 10,000 acres of land to be irrigated. Moreover, by letter dated February 28, 1934, the Assistant Secretary of the Interior wrote to the Attorney General of the United States, and said:

> It is manifest from the foregoing that there was and now is no intention of this department to abandon or jeopardize its claim to water rights as set out in the Amended Bill of Complaint in this case. The only purpose of constructing a small reservoir is to provide regulation of the available flow of the river, which regulation is necessary to properly utilize the water rights of the Reservation.

Ax., Vol. IV, Exh. 47 at 560-561.

59. The Commissioner of Indian Affairs advised the Walker River Indian Business Committee that "the reservoir . . . is considered necessary regardless of the quantity of water which may be decreed the Indian lands. Its principal purpose is as a stabilization reservoir to regulate and control the flow of the Walker River." Ax., Vol. IV, Exh 48 at 563.

60. The District's counsel again contacted counsel for the United States in September of 1934 about a stipulation to make the Court aware that the reservoir had been constructed, and that the Court take that into account in deciding the case. Ax., Vol. IV, Exh. 49 at 565-566.

61. The Assistant Attorney General advised counsel for the United States not to sign the stipulation and to oppose any effort to reopen the case. Ax., Vol. IV, Exh. 50 at 568.

62. Immediately thereafter, counsel for the United States informed the District's counsel that the United States would not sign the stipulation and was not willing to have further

hearings because the "matters mentioned are wholly immaterial to the issues." Ax., Vol. IV, Exh. 51 at 570.

63. No further steps were taken to reopen the case. However, the District Court became aware of the construction of the reservoir in 1935. The United States filed a brief in support of its Exceptions to the Master's Report, stating that the reservoir recommended in the Blomgren Report had not been built. The District responded, stating that a reservoir had in fact been built, although not the one recommended in the Blomgren Report. Ax., Vol. IV, Exh. 52 at 572-581; *see* Exh. 52 at 577-579..

64. From 1936 to 1940, the United States purchased 41 allotments totaling about 810 acres from individual Indian landowners whose allotments were or would be inundated by water in Weber Reservoir. *See*, Land Status History of the Walker River Indian Reservation, by Sandra Lewis at p. 7, July 27, 2020.

6. The Special Master's Report and District Court Decision.

65. The Special Master submitted his formal report on or about December 24, 1932. In that Report, he stated that the United States should be granted a priority right (1859) to 26.25 feet of water per second for the irrigation of 2,100 acres on the Reservation. *See*, Doc. 7 at US0035661. In his Proposed Findings of Fact, the Special Master stated "A flow of water from said river of 26.25 second feet at the point or points of diversion during the irrigation season of 180 days is necessary for the proper irrigation of said 2,100 acres." Doc. 7 at US0035681. In his Proposed Conclusions of Law, he added and "the flow of water reasonably necessary for domestic and stockwatering purposes and for power purposes to the extent now used by [the United States] during the non-irrigating season with a priority of November 29, 1859 . . . ." Doc. 7 at US0035696-0035697. His proposed Decree included the same provisions. Doc. 7 at US0035709.

66. In its Exceptions to the Special Master's Report, the United States argued that the Master should have recommended granting a water right for 10,000 acres of land, and that the United States had "designed and to a large extent constructed an irrigation system for the ultimate irrigation of not less than 10,000 acres of land upon the Reservation." Doc. 7 at US0035725.

67. The District Court concluded that the implied reservation of water doctrine of *Winters v. United States*, 207 U.S. 564 (1908) did not apply because the Reservation had been established by executive order rather than by treaty. It held that the rights for the Reservation had to be "adjudged, measured and administered in accordance with the laws of appropriation as established by the State of Nevada." *United States v. Walker River Irrigation Dist.*, 11 F.Supp. 158, 167 (D. Nev. 1935). The District Court recognized water rights for the United States on that basis for the Reservation.

68. In its Sept. 27, 1935 Exceptions to the Master's Findings of Fact which were prepared at the direction of the District Court after it had made its decision that the United States had made no reservation of water for the Reservation, the United States said that the setting aside of the Reservation for the use of the Tribe "by necessary implication set aside and reserved so much of the then unused, unappropriated undisposed of and surplus water of the Walker River as would in the future be needed by the Indians. . . ." Doc. 8 at US0035861.

69. The District Court accordingly entered its Decree on April 14, 1936, which included Paragraph XII which provided:

> XII. This decree shall be deemed to determine all of the rights of the parties to this suit and their successors in interest in and to the waters of Walker River and its tributaries, except the undetermined rights of Walker River Irrigation District under its applications to the State Water Commission of the State of California and the undetermined rights of the applicants for permits from the State Engineer of the State of Nevada hereinabove specified, and it is hereby ordered, adjudged and decreed that none of the parties to this suit has any right, title, interest

> or estate in or to the waters of said Walker River, its branches or its tributaries other than as above set forth, excepting the undetermined rights of Walker River Irrigation District and the several applicants for permits from the State Engineer of the State of Nevada. Nothing herein shall prejudice the rights of any of the parties defendant hereto under any transfer or legal succession in interest since the commencement of this suit to any of the rights hereby adjudicated to the several parties defendant.

7. The Appeal to the Ninth Circuit.

70. The United States appealed to the Ninth Circuit Court of Appeals.[8]

71. The Ninth Circuit reversed the District Court's conclusion that Nevada law applied, and held that the implied reservation of water doctrine did apply. It said:

> We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. There remains for decision the question as to the quantity to which the United States is entitled.

United States v. Walker River Irrigation District, 104 F.2d 334, 339-340 (9th Cir. 1939). As to that issue, the Ninth Circuit accepted the report of the Special Master. It held:

> The decree is reversed with directions to enter a decree adjudging the United States to be entitled to the continuous flow of 26.25 cubic feet of water per second to be diverted from Walker River upon or above Walker River Indian Reservation during the irrigation season of 180 days for the irrigation of 2,100 acres of land on the Reservation . . . .

104 F.2d at 340.

72. After receiving the decision of the Ninth Circuit on the appeal from the District Court's decision, neither the United States nor the Defendants were satisfied. Both filed petitions for rehearing. Ax., Vol. IV, Exh. 53 at 583.

[8] The Principal Defendants have been unable to locate a copy of the Brief of the United States in the documents produced thus far. Because of the closure of archive facilities, they have been unable to obtain it directly. They believe the Brief will further support the fact that the United States was seeking the full entire implied reserved right for the present and future needs of the Reservation.

73. In its Petition for Rehearing, the United States argued that as a result of the reservation of land in 1859, it was entitled to a quantity of water "not merely sufficient to supply the present needs of the Walker River Indians, but sufficient to irrigate all irrigable lands of the reservation" and that it could not be limited based upon only 70 years of experience. It argued that the "presently foreseeable needs of land and water for the Indians will ultimately equal land in the amount of 10,000 acres and water sufficient to irrigate it." Ax., Vol. IV, Exh. 54 at 585-599.

74. The Petitions for Rehearing were denied. Ax., Vol. IV, Exh. 55 at 601.

8. The Unfiled Petitions for Certiorari.

75. Both the United States and the Defendants finalized and were prepared to file Petitions for Certiorari with the United States Supreme Court.[9] Ax., Vol. IV, Exh. 56 at 603.

76. The United States agreed not to file its Petition for Certiorari if the Defendants did not file theirs. Neither Petition was filed. Ax., Vol. IV, Exh. 57 at 605-606.

9. The Amendment to the Decree.

77. Only after the Ninth Circuit rejected the United States' claim for 150 cfs with an 1859 priority date to irrigate 10,000 acres of land, and after it had decided not to petition for certiorari, did the United States change its position on the purpose of Weber Reservoir. Recognizing that without a first priority water right to 150 cfs of flow it might need to store water in addition to the 26.25 cfs flow, which it had been awarded, the United States became concerned that Paragraph XII of the Decree entered in 1936 would bar such a right, even if pursued under

[9] The Principal Defendants have been unable to locate a copy of the Petition of the United States in the documents produced thus far, even though a Memorandum for the Solicitor General, dated October 3, 1939, states "the facts of this case *and the* question presented are fully set out in the accompanying draft of a petition for certiorari which has been prepared for filing," which time for filing expired on October 14, 1939. *See*, US0036554. Because of the closure of archive facilities, they have been unable to obtain it directly. They believe that the Petition will further support the fact that the United States was seeking the full entire implied reserved water right for the present and future needs of the Reservation.

state law. The United States sought to ensure that Paragraph XII of the Decree would not bar a storage right with a priority of July 1, 1933. Ax., Vol. IV, Exh. 58 at 608.

78. On November 4, 1939, the Assistant Attorney General wrote to the Special Assistant then handling the proposed amendment to the Decree to conform to the Ninth Circuit's decision requesting that Paragraph XII be amended to except the "undetermined storage rights of plaintiff." Ax., Vol. IV, Exh. 59 at 610-611.

79. After some discussions with counsel for defendants, the Special Assistant advised the Attorney General that:

> The motion now pending before the Court is purely one for entry of an amended decree pursuant to the Writ of Mandate. Necessarily, it seems to me that if we desire determination by the trial court of the right of a storage priority for Weber Reservoir, we must either proceed by motion to open up the decree and permit the taking of further testimony or bring new suit as against the Walker River Irrigation District and any other storage rights to determine the storage right of this Indian reservoir.

Ax., Vol. IV, Exh. 60 at 613-618; *see* Exh. 60 at 616.

80. Neither of those alternatives was pursued. Instead, the Special Assistant Attorney General told the Attorney General that he believed the defendants would stipulate to amend Paragraph XII of the Decree to insert "as of the 14th day of April 1936" following the word "tributaries." Ax., Vol. IV, Exh. 60 at 616-617. The Decree was amended accordingly.

81. That Special Assistant also told the Attorney General that the United States "would not be barred from claiming a priority for Weber Reservoir as of April 15, 1936, at any time that it may seek such a right in the future." Ax., Vol. IV, Exh. 60 at 617.

82. The Decree was amended on April 24, 1940 to provide the following with respect to the rights of the United States:

RIGHTS OF THE UNITED STATES OF AMERICA

I. The plaintiff, United States of America, is hereby adjudged and decreed to be the owner of the right to divert a continuous flow of 26.25 cubic feet per second of the natural flow of the Walker River to be diverted from said stream upon or above the Walker River Indian Reservation during the irrigation season of 180 days of each year for the irrigation of 2100 acres of land situated in the Walker River Indian Reservation, in addition to whatever flow of said stream is reasonably necessary for domestic and stock watering purposes and power purposes, to the extent now used by plaintiff during the no-irrigation season, all with a priority of November 29, 1859, the date of the establishment of said Indian Reservation. The said natural flow of water of said stream and its said tributaries to be diverted therefrom at the points of diversion now used for such purpose by plaintiff or at such other points as may hereafter be selected by plaintiff for such diversion, either upon or above the Walker River Indian Reservation, provided, however, that any change in point or points of diversion sought to be made by the United States of America, to a point or points above the present boundaries of the Walker River Indian Reservation, shall not be made except upon petition to this Court and its approval obtained after hearing upon such notice as the Court may order, and the Court expressly reserves jurisdiction of this cause for the purpose of hearing and determining such a petition or petitions.

The defendants and each of them, their several servants, agents, attorneys and all persons claiming by, through or under them, are forever enjoined and restrained from preventing or interfering with the natural flow of said quantities of water from the channels of the said stream and its said tributaries down to and upon said Indian Reservation.

Walker River Decree, Rights of United States of America.

83. Although the United States considered filings related to a water right for Weber Reservoir with both Nevada and California, that, too, did not happen. Ax., Vol. IV, Exh. 61 at 621-622; Exh. 62 at 624; Exhs. 63-65 at 626-635.

84. Although the Nevada-California Interstate Water Compact would have recognized a water right for Weber Reservoir, it was never ratified, and its ratification was consistently opposed by both the United States and Walker River Paiute Tribe. That Compact will never be ratified because the interstate allocation it contemplated included the Truckee and Carson Rivers and Lake Tahoe, as well as the Walker River. *See*, N.R.S. 538.600. In 1990, the interstate

allocation of the Truckee and Carson Rivers and Lake Tahoe was resolved by Public Law 101.618, 104 Stat. 3289.

10. The Land Proposed to Be Irrigated With Additional Water.

85. The land which the United States and Walker River Paiute Tribe propose to irrigate with stored water from Weber Reservoir includes 2,100 acres for which they already have the first right on the Walker River, 2,800 acres of what is referred to as non-Walker River Indian Irrigation Project land which receives water through those facilities and 1,056 acres of pasture land which receives water through a separate diversion. *See*, Detailed Statement (ECF 2476) at 5-6.

86. The United States and Walker River Paiute Tribe seek an implied reserved right to groundwater with an 1859 priority date to irrigate 1,238 acres which is on land originally reserved in and continuously held for the Tribe since 1859. *See*, Detailed Statement (ECF 2476) at 11.

87. The Plaintiffs also seek an implied reserved groundwater right with an 1859 priority for uses within the Reservation as it existed in 1924 for domestic and stockwatering purposes which are already provided for in the Decree. *See*, Walker River Decree, Rights of the United States of America.

88. The Plaintiffs also seek rights from springs and wells for stockwatering purposes on the 1918 and 1924/1928 lands for which, if they were part of the Reservation during the litigation, the Decree already provides a right. *See*, Walker River Decree, Rights of the United States of America.

C. Conclusion.

Plaintiffs refer the Court to various documents to support what they contend are the following four "undisputed" conclusions:

1. The only claim litigated in the first phase of this case was the Tribe's surface water right to irrigate 10,000 acres of the Walker River Indian Reservation ("Reservation") within the Reservation's permanent boundaries, as they existed in 1924, from the direct, uninterrupted, natural flows of the Walker River.

2. The district court record in *Walker I* and stipulations by the parties following trial show that the Tribe's storage right to Weber Reservoir has not been litigated.

3. The district court record in *Walker I* and this Court's 1994 Order show that the Tribe's groundwater rights have not been litigated.

4. The district court record in *Walker I* shows that the Tribe's surface water rights to lands added to the Reservation in 1928, 1936, and 1972 have not been litigated.

MPSJ (ECF 2638) at Attachment B. Based upon the facts set forth above, the information which supports them, and the relevant law discussed below, it is clear that those conclusions cannot be made at all, or at a minimum there are genuine disputes with respect to them.

ARGUMENT

III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PRINCIPAL DEFENDANTS' FINALITY AND REPOSE DEFENSE MUST BE DENIED BECAUSE THE "CLAIMS" PLAINTIFFS MAKE HERE FOR STORAGE IN WEBER RESERVOIR, FOR GROUNDWATER ON THE RESERVATION AS IT EXISTED DURING THE LITIGATION, AND FOR THE 1918 AND 1924/1928 LANDS ARE (1) CLAIMS THT COULD HAVE BEEN MADE, AND/OR (2) CLAIMS THAT WERE MADE IN THE ORIGINAL LITIGATION.

A. Introduction.

In contending that they are entitled to partial summary judgment on the finality and repose defense, Plaintiffs assert that under *Arizona v. California*, 460 U.S. 612 (1983) (*Arizona II*), finality and repose apply only to "claims" that were "previously litigated." *See*, MPSJ (ECF 2638) at 20-25. They argue that the only "claim" litigated from 1924 through 1939 was a claim for the "uninterrupted, direct-flow surface water right to the Walker River associated with 10,000 acres of irrigable land within the Reservation as it existed in 1924." MPSJ (ECF 2638) at 25. Therefore, Plaintiffs conclude, they may now assert a storage right for Weber Reservoir and groundwater

rights for the Reservation as it existed in 1924 and all water rights for the 1918, 1924/1928, 1936 and 1972 lands. *Id.* at 26-30. They argue that "claims" which "could have been litigated" are not relevant. *Id.* at 30-33. We address each of these contentions in turn.

First, Plaintiffs misread *Arizona II*. Contrary to Plaintiffs' argument that the principles of finality and repose described and defined by *Arizona II* bar only "claims" that were "previously litigated," *Arizona II* bars "claims" that "could have been litigated."[10] The "claims" here for an increased quantity of water from the Walker River to store in Weber Reservoir, for an enlarged implied reserved water right for the Reservation as it existed in 1924 from groundwater and for stockwater for the 1918 and 1924/1928 lands are all "claims" that, for the most part, existed before the Complaint was filed in 1924 and which clearly existed before any testimony was taken. Notably, Plaintiffs do not argue that their "claims" could not have been litigated in the original litigation, and they have provided no explanation for why they failed to present them during the Walker River litigation. Since those "claims" could have been litigated in the original litigation, they are barred by principles of finality and repose described in *Arizona II*.

Indeed, the claim for Weber Reservoir, if there is one, not only could have been litigated, it was not litigated for several reasons. First, the United States recognized that a reservoir was simply a facility which might be built and used to manage, regulate and possibly store the Reservation's implied reserved water right once established and quantified. As one would expect, initially, the United States, like others similarly situated, preferred to have a recognized water right before building a reservoir. Second, throughout the litigation, it was the position of the United

[10] Our use of the word "claims" here is not intended to recognize that a Reservation has numerous "claims" for implied reserved water rights based upon each separate use of water or each separate source of water. Rather, it is used as intended by *Arizona II* --- as bases for enlarging or increasing the quantity of water impliedly reserved for the Reservation, which in effect was the "claim" for the "omitted lands" in *Arizona II*.

States that no reservoir was needed if it received the implied reserved water right it sought. Finally, when it became apparent that it might not achieve that outcome, and when it had an opportunity to raise the storage right issue, the United States, for its own strategic reasons, intentionally chose not to raise it. *See*, Statement of Facts, Nos. 37-40; 57-62 above.

Similarly, if the implied reserved water right for this Reservation could have been wholly or partially satisfied from groundwater, the claim for it could have been, but was not, litigated because the United States, for its own reasons, chose the Walker River as the only available source of water. *See*, Statement of Facts, Nos. 8; 16 above. In addition, the water rights the United States seeks here for the 1918 and 1924/1928 lands could have been asserted. All actions related to those lands were complete, either before the litigation began or before testimony was taken. The 1918 lands were part of the 86,400 acres of land referred to in the Complaint the United States filed in 1924. *See*, Statement of Facts, Nos. 13-15 above.[11]

Assuming for the sake of argument that *Arizona II* bars only "claims" that were "previously litigated," Plaintiffs' argument that the "claims" here are not barred is based upon an improper definition of what constitutes a "claim." As we have shown in the facts above and argue below, the "claim" that was actually litigated from 1924 through 1939 was the United States' entire water right under the implied reservation of water doctrine for the Walker River Indian Reservation to meet the then and future needs of the Tribe quantified by 10,000 acres of irrigable land and with an 1859 priority date. For practical reasons, the United States sought to satisfy that right from the surface water of the Walker River, which was its choice. However, having made that choice, it is not entitled, decades later, to enlarge its right by asserting the same claim against a groundwater source. A right for water to store in Weber Reservoir, if it existed, must be based upon the

[11] The Principal Defendants do not contend that finality and repose bar the claims for the 1936 and 1972 lands.

reservation of land in 1859, a fact the United States recognized during the litigation. It could not be and was not established simply because the United States built a reservoir, a fact the United States also recognized.

If *Arizona II* finality and repose principles do not apply under the facts present here, they are unlikely to apply in any situation.

B. The Ninth Circuit in *Walker IV* Held That Principles of Finality and Repose Apply to the Plaintiffs' Claims for Additional Reserved Rights, But the Ninth Circuit Did Not Decide the Issue and Instead Allowed This Court to Decide the Issue.

The Plaintiffs imply and seemingly would have the Court infer that the Ninth Circuit's decision in *United States v. Walker River Irrig. Dist., et al*., 890 F.3d 1161 (9th Cir. 2018) ("*Walker IV*"), actually decided that the claims sought to be litigated here were not "previously litigated" and are not barred under principles of finality and repose. *See*, MPSJ (ECF 2638) at 20; 24. There, the Ninth Circuit held that the plaintiffs' claims for additional reserved rights are not barred by the doctrine of *res judicata*, because the reserved jurisdiction clause of the Walker River Decree reserves jurisdiction for the Decree Court to "correct" or modify" the Decree. *Walker IV*, 890 F.3d at 1172.

In a separate discussion later in its opinion, however, the Ninth Circuit stated that under the Supreme Court's decision in *Arizona II*, the principle that "[i]nstead" applies is that the plaintiffs' claims are, in the words of *Arizona II*, "'subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.'" *Id*. at 1173, quoting *Arizona II*, 460 U.S. at 619. The Ninth Circuit did not, however, apply these "general principles of finality and repose" to determine whether they bar the Plaintiffs' claims for additional reserved rights. Thus, the Ninth Circuit left the issue for this Court to decide.

This Court, in its Order granting the Plaintiffs' MJOP, citing the Ninth Circuit's decision in *Walker IV*, held that the Plaintiffs' claims for additional reserved rights are not barred by *traditional* principles of claim preclusion, specifically *res judicata* and collateral estoppel. Order, ECF 2626, at 9-10. This Court made clear, however, that its Order does not address the issue of whether the Plaintiffs' claims are barred by the "general principles of finality and repose" that were described by the Supreme Court in *Arizona II* and cited by the Ninth Circuit in *Walker IV*, and that this issue would be addressed subsequently in this litigation. *Id*. at 3-4. Thus, this issue has not been decided.

C. The Principles of Finality and Repose as Described and Defined in *Arizona II* Preclude the "Claims" for Storage, for Groundwater As the Reservation Existed During the Litigation, and for the 1918 and 1924/1928 Lands.

1. *Arizona II* Clearly Held That Principles of Finality and Repose Bar "Claims" That Could Have Been Litigated.

In *Arizona v. California*, 373 U.S. 546, 595-601 (1963) ("*Arizona I*"), the Supreme Court decided a major dispute between Arizona and California over their respective apportionments of Colorado River water, and, as part of its decision, held that the United States had reserved water rights for the Colorado River Indian Tribes in the Colorado River. The Court issued a decree the following year, the Colorado River Decree, that adjudicated and quantified the United States' reserved rights for the Tribes. *Arizona v. California*, 376 U.S. 340 (1964).

However, not all aspects of the case were finally resolved by the 1964 Decree. There was a dispute between the States and the United States concerning the boundaries of two of the Reservations which the Special Master had resolved. The Supreme Court had found that the resolution of the boundary dispute was unnecessary, and provided in Article II(D) of the Decree that the quantities of water for those Reservations would be "subject to appropriate adjustment by

agreement or decree of this Court in the event that the boundaries of the respective Reservations are finally determined." *Arizona*, 376 U.S. at 345; *Arizona II*, 460 U.S. at 610-611.

Several years later, certain Tribes moved to intervene and raised claims for additional water rights for two types of lands: (1) "omitted" lands – irrigable lands, within the original recognized boundaries of the Reservations, for which the United States had failed to claim water rights in the earlier litigation; and (2) "boundary" lands – land that was or should have been recognized as part of the Reservations and that had now been finally determined to be within them within the meaning of the 1964 Decree. *Arizona II*, 460 U.S. at 612. The issue in *Arizona II*, relevant here, was whether the case should be "reopened to consider claims for "omitted" lands for which water rights could have been sought in the litigation preceding the 1964 Decree." *Arizona II*, 460 U.S. at 615. [Emphasis added]. The Supreme Court held that the 1964 Decree precluded relitigation. *Id.* at 616.

Before explaining its reasons for that conclusion, the Court made several important points about what was at issue in *Arizona I* and which bear on how *Arizona II* applies here. Initially, it noted that in the original action, the United States had acquired water rights for the five Reservations and that now the United States and Tribe "seek to have those water rights increased." *Arizona II*, 460 U.S. at 608. Then it quoted from the Special Master's finding that the "claim in the original case . . . embraced the totality of water rights for the Reservation lands." *Arizona II*, 460 U.S. at 615. It noted that quantifying those rights had been hotly contested in *Arizona I*. The States had argued that the quantity of water reserved "should be measured by the Indians' reasonably foreseeable needs, *i.e.*, by the number of Indians." *Id.* at 617. Next, it said that in *Arizona I* it had adopted the "practicably irrigable acreage standard" for that quantification because it allowed a "present water allocation that would be appropriate for future needs." *Arizona II*, 400 U.S. at 617. Noting that the United States had won a complete victory in *Arizona I*, it said that the

victory "was in part attributable to the Court's interest in a fixed calculation of future water needs," based upon the practically irrigable acreage quantification. *Id.*

The Court then considered the claim for more water for the Reservation's "omitted" lands. It had no trouble in immediately concluding that "there is no question that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of *res judicata*." *Arizona II*, 460 U.S. at 617. It recognized that the claim being made and the issue to be litigated had been litigated in the original action. It concluded that the United States' claims for additional reserved rights for the "omitted" lands were not barred by "traditional" principles of claim and issue preclusion, specifically *res judicata* and collateral estoppel, only because Article IX of the Colorado River Decree reserved jurisdiction for purposes of "modification" of the decree, and that an action to modify the decree to include additional reserved water rights is the "same proceeding" in which the decree was issued. Therefore, technical rules of "*res judicata* and collateral estoppel do not apply." *Id*.

The Supreme Court in *Arizona II* held that—even though *res judicata* and collateral estoppel did not bar the United States' claims for additional rights—the United States' claims were barred by the "general principles of finality and repose" that apply to water rights decrees. *Arizona II*, 460 U.S. at 619. The Court stated that the reserved jurisdiction clause of the Colorado River Decree "must be given a narrower reading and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Id*. The Court stated that "while the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision." *Id*. The Court stated that the "water rights [for the "omitted" lands] ***could have been sought*** in the litigation preceding the 1964 Decree," but that the water rights were not sought in the litigation. *Id*. at 615. [Emphasis added]. The Court concluded that "general principles of finality and repose" preclude the United States

from asserting claims for additional reserved rights for the Colorado River Indian Tribes. *Id*. at 621-622. Thus, *Arizona II* plainly held that the United States is barred from asserting claims for additional reserved rights for Indian tribes that "could have been sought"—but were not—in the water rights litigation that led to the decree.

Arizona II explained more fully why principles of finality and repose precluded the United States from asserting claims for additional reserved rights, stating:

> To preclude parties from contesting matters that they have had a *full and fair opportunity to litigate* protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. In no context is this more true than with respect to rights in real property. . . . . *Certainty of rights is particularly important with respect to water rights in the Western United States.* The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the county. The doctrine of prior appropriation, the prevailing law of the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Arizona II, 460 U.S. at 619-620 (citations and internal quote marks omitted. [Emphasis added]. The Court added that "recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest of finality in this case," which from its inception had been "to provide the necessary assurance to the states of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system." *Arizona II*, 460 U.S. at 620.

Thus, *Arizona II* held that—even though the "technical rules" of claim preclusion did not bar the United States' claims for additional water rights—the United States' claims were barred by "general principles of finality and repose." *Arizona II*, 460 U.S. at 619. As the Court noted, the United States "could have . . . sought" its claims in the earlier litigation, *id*. at 615, and the United States had a "full and fair opportunity to litigate" the claims in the earlier litigation. *Id*. at 619. Thus, *Arizona II* bars the United States from asserting claims for additional reserved rights

that it "could have . . . sought" in the original litigation, where the United States had a "full and fair opportunity to litigate" the claims, even though the United States' claims are not barred by technical rules of claim preclusion, *i.e.*, *res judicata* and collateral estoppel.

Notably, *Arizona II* held that—while the "technical rules of preclusion," *i.e.*, *res judicata* and collateral estoppel, did not apply—"the principles upon which these rules are founded should *inform* our decision." *Arizona II*, 460 U.S. at 619. [Emphasis added]. Thus, while *res judicata* may not strictly apply, the "principles" of *res judicata* "inform" the principles of finality and repose. The principles of *res judicata* that "inform" finality and repose were described more fully by the Supreme Court in its contemporaneous decision in *Nevada v. United States*, 463 U.S. 110, 129-130 (1983), which was decided the same year as and shortly after *Arizona II*. In *Nevada*, the Supreme Court held that the United States was barred from claiming additional reserved rights for the Pyramid Lake Indian Reservation in the Truckee River in Nevada, because the United States' claims for the Tribe had been fully litigated in the Orr Ditch Decree, which had adjudicated all water rights in the river. The Supreme Court in *Nevada* noted that *res judicata* bars not only claims that were *actually litigated* between the parties but also claims that *could have been* litigated. *Nevada*, 463 U.S. at 129-130, citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). The *Nevada* Court described the importance of finality and certainty of water rights decrees, stating:

> The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. . . . Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply.

Id. at 129 n. 10 (citations and internal quotation marks omitted).

Thus, even though the "technical" rules of *res judicata* may not apply here because of the reserved jurisdiction clause of the Walker River Decree, these technical rules "inform" the "general principles of finality and repose" that do apply, and these "general principles," as so "inform[ed]," preclude the Plaintiffs' assertion of "claims" for additional water rights that *could have been* adjudicated in the original litigation, even though the "claims" were not adjudicated. In the words of *Arizona II*, the Plaintiffs "could have . . . sought" most of their claimed reserved rights in the original litigation, and they had a "full and fair opportunity" to do so, because most of their "claims" for additional reserved rights arose prior to the commencement of the original litigation.

The Plaintiffs, notably, have not claimed that they could *not* have presented those "claims" for an increased quantity of water in the Walker River litigation, and they have offered no explanation for why they did not present those "claims" for additional water in the litigation or why they waited several decades before asserting them. The principles of finality and repose described in *Arizona II* plainly preclude the Plaintiffs from belatedly asserting these "claims" for additional water now, more than eighty years after the Decree was issued.

The principles of finality and repose described in *Arizona II* vitiate the Plaintiffs' claims for additional reserved rights that arose prior to the commencement of the litigation and could have been adjudicated by it. Just as *Arizona II* held that principles of finality and repose precluded the United States from asserting claims for additional reserved rights in the Colorado River, because the United States had a full and fair opportunity to present its claims in the Colorado River litigation, the principles of finality and repose preclude the Plaintiffs here from asserting claims for additional reserved rights, because the Plaintiffs had a full and fair opportunity to present their claims in the original litigation. Just as *Arizona II* held that these principles required a "narrower reading" of the reserved jurisdiction clause of the Colorado River Decree, which authorized "modification" of the decree, these same principles require a narrower reading of the reserved

jurisdiction clause of the Walker River Decree, which, like the Colorado River Decree, authorizes "modifying" the Decree. Under this "narrower reading," the reserved jurisdiction clause of the Walker River Decree cannot properly be construed as authorizing the Plaintiffs to assert claims for additional reserved rights that arose prior to the commencement of the original litigation and could have been adjudicated in it. This is how the Supreme Court in *Arizona II* construed the reserved jurisdiction clause of the Colorado River Decree, and the virtually-identical reserved jurisdiction clause of the Walker River Decree should be construed the same way.

Finality and repose apply with particular force in the case of a water rights decree that, like the Walker River Decree, comprehensively adjudicates water rights in a river system. The Walker River Decree was plainly intended to comprehensively adjudicate water rights in the Walker River in order that the States, water users and subsequent appropriators would be able to exercise and rely on their rights in conducting and planning their present and future operations. Indeed, the Ninth Circuit has cited the Walker River Decree as an example of a "comprehensive adjudication" of water rights. *United States v. Truckee-Carson Irr. Dist.,* 649 F.2d 1286, 1302 (9th Cir. 1981). Although the United States has insisted that it initiated the Walker River litigation as an *in personam* action simply to adjudicate the Tribe's water rights in the Walker River, the Supreme Court in *Nevada* held that—although a quiet title action to adjudicate a water right is normally an *in personam* action—a quiet title action that results in a general adjudication of water rights in a river or stream system is more in the nature of an *in rem* action, because the adjudication resolves numerous competing claims in a particular *res*, namely a body of water. *Nevada v. United States*, 463 U.S. 110, 143-144 (1983). Thus, just as the Orr Ditch Decree in *Nevada* comprehensively adjudicated water rights in the Truckee River, including "the *full* 'implied-reservation-of-water' rights" for the Pyramid Lake reservation, *id.* at 133 (emphasis added), the Walker River Decree

comprehensively adjudicated water rights in the Walker River, including the United States' full reserved right for the Tribe.

Indeed, the United States made clear, in initiating the Walker River litigation, that it sought an adjudication of the United States' *entire* reserved water right for the Reservation and not only a portion of its right. The United States' complaint alleged that "there is *no other source of supply of water* for the irrigation of said lands" of the reservation than the water in which the United States sought a reserved right. [Emphasis added]. *See*, Statement of Facts, No. 16 above. Since the United States represented that there is "no other source of supply of water" for the Tribe's needs than that sought by the United States in the adjudication, the United States made clear that the water sought by the United States is the entire amount of water encompassed in the United States' reserved right for the Tribe.

Finally, as a matter of sound public policy, the Plaintiffs should not be permitted to seek piecemeal adjudication of their water rights by seeking adjudication of some rights in the original adjudication from 1924 to 1939 and then seeking adjudication of additional rights in the next century, after the water users whose rights were adjudicated have long exercised and relied on their rights and the Decree in planning and conducting their current and future operations. Such piecemeal adjudication of the Plaintiffs' reserved rights claims would mean that water rights decrees are never final and certain, because the United States could always assert additional "unlitigated" claims many years or decades later. Such piecemeal adjudication would defeat the reasonable expectations of water users whose rights were adjudicated, and who have reasonably relied on their rights in conducting and planning their operations, because their adjudicated rights would be subject to defeasance by the United States' later assertion of its claims. In *Arizona II*, the Supreme Court emphasized that the very purpose of water rights decrees is to provide "certainty" of water rights, and that "certainty of rights is particularly important with respect to

water rights in the Western United States." *Arizona II*, 460 U.S. at 620. Thus, the principles established in *Arizona II* preclude the Plaintiffs from seeking piecemeal adjudication of their reserved rights claims.

In sum, *Arizona II* held that—even though the technical rules of *res judicata* and collateral estoppel did not bar the United States' claims for additional reserved rights in the Colorado River—the general principles of finality and repose barred the claims, because the claims arose prior to the Colorado River Decree and could have been adjudicated in the Decree. Under *Arizona II*, the Plaintiffs are barred from asserting their claims for additional reserved rights here which arose prior to the commencement of and could have been adjudicated in the original litigation. This Court should deny the Plaintiffs' Motion for Partial Summary Judgment to the extent it seeks dismissal of the defendants' affirmative defenses based on principles of finality and repose.

2. Plaintiffs Misconstrue the Principles of Finality and Repose Described in *Arizona II*.

The Plaintiffs' argument misconstrues *Arizona II*, and the principles of finality and repose described therein, for several reasons.[12] The "claims" for increased water rights for the Reservation to store in Weber Reservoir to irrigate lands which already have a water right under the decree, to irrigate land that received no water right in the original litigation, or to irrigate any other land now within the Reservation, is no different than the "omitted lands" in *Arizona II*. The same is true with respect to the "claim" for an enlarged water right from groundwater to irrigate

[12] *Arizona II* held that principles of finality and repose apply "absent changed circumstances or unforeseen issues not previously litigated." *Arizona II*, 460 U.S. at 619. Thus, *Arizona II* held that an exception to principles of finality and repose applies in cases of "changed circumstances" or "unforeseen issues not previously litigated." The Plaintiffs do not contend, however, that these exceptions apply their claims, and thus no issue arises concerning the exceptions as applied here.

land which received no water right in the original litigation, and for the increased claim for stock water and domestic use from groundwater.

First, the Plaintiffs' argument that those bases or "claims" are barred only if they were actually raised and litigated in the original litigation, is inconsistent with the principles of finality and repose as defined in *Arizona II* itself. *Arizona II* held that the United States was barred from asserting claims for additional reserved rights because the claimed rights "could have been sought" in the earlier litigation, *Arizona II*, 460 at 615, and the United States had a "full and fair opportunity to litigate" the claims in the earlier litigation. *Id*. at 619. Thus, *Arizona II* did not suggest that finality and repose bars only claims that were previously litigated. *Arizona II* also held that principles of finality and repose are "inform[ed]" by traditional claim preclusion principles, *i.e*., *res judicata, id*., and the traditional principles of re judicata bar not only claims that were actually litigated but also claims that could have been litigated. *Nevada v. United States*, 463 U.S. 110, 129-130 (1983); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). Additionally, *Arizona II* held that principles of finality and repose were based on the need to ensure finality and certainty of water rights decrees, and of rights adjudicated in the decrees; as the Court said, "[c]ertainty of rights is particularly important with respect to water rights in the Western United States." *Arizona II*, 460 U.S. at 620. Thus, *Arizona II* made clear that the need for finality and certainty of adjudicated water rights precludes the United States' belated assertion of claims for additional water rights that could have been adjudicated in an earlier decree, and that could jeopardize adjudicated rights that have been long settled and relied on. *Arizona II* did not hold or suggest that the United States is barred only from belatedly asserting claims for additional water rights that were "previously litigated," as the Plaintiffs contend.

Second, the Plaintiffs' argument conflicts with the underlying rationale of the principles of finality and repose described in *Arizona II*. Under their argument, the Plaintiffs would be allowed

to purposefully and deliberately withhold submission of a claim for reserved rights during a general adjudication of water rights in a river system, and then—many years or decades later, after the water users have relied on their adjudicated rights in planning and conducting their present and future operations—seek to modify the decree on the ground that their claimed reserved right was not "previously litigated." Suppose, for example, that the United States claims two different reserved rights for an Indian tribe based on two different sources of federal law, one right based on the original reservation of land for the tribe and the other based on a subsequently-enacted congressional statute enlarging the reservation which had been enacted before or during the litigation. Under the Plaintiffs' theory, the Plaintiffs would be allowed to claim the first reserved right claim during the general stream adjudication and withhold the second claim, and then assert the second claim many years or decades later—a claim that, if upheld, would defeat the reasonable expectations of water users whose rights were adjudicated in the general adjudication. *Arizona II* foreclosed this possibility by holding that a claimed reserved right that could have been raised and litigated in the earlier litigation cannot be raised in a subsequent litigation, because otherwise this would jeopardize the finality and certainty of water rights decrees and adjudicated water rights that is vital to the economic and societal needs of the western states.

Indeed, the hypothetical situation described above has actually occurred in this case. Here, the Plaintiffs claim that—in addition to their reserved rights adjudicated in the Walker River Decree—they have additional reserved rights for lands made available by executive orders issued on March 15, 1918, and June 27, 1924, the latter of which was confirmed by a congressional statute enacted on March 3, 1928. United States' Detailed Statement (ECF 2476) at 7; United States' Amended Counterclaim, ECF 2477-1, at 5; Tribe's Second Amended Counterclaim (ECF 2479) at 4. The Walker River litigation commenced in 1924, and the Walker River Decree was issued in 1936. Thus, the Plaintiffs' claims for additional reserved rights based on the 1918 and 1924

executive orders and the 1928 congressional statute could have been raised, litigated and adjudicated in the Walker River litigation. The principles of finality and repose described in *Arizona II* were intended to prevent this very type of situation, in which water rights claims that could have been presented and adjudicated in an earlier water rights litigation are instead withheld and asserted many decades later, with prejudice to the rights of water users whose rights were adjudicated and who have long exercised and relied on their adjudicated rights.

Third, the Plaintiffs' contention that principles of finality and repose bar only claims "previously litigated" is inconsistent with their argument before the Ninth Circuit in *Walker IV*. There, the plaintiffs argued that "with respect to pre-1936 claims, the district court should have determined whether litigation leading to the Decree addressed, *or should have addressed*, the same claims." Opening Br. for United States, *United States, et al. v. Walker River Irrig. Dist., et al.*, at 39, Nos. 15-16478, 15-16479 (Dkt. 18), Ninth Circuit Court of Appeals (June 15, 2016). [Emphasis added]. Thus, the Plaintiffs acknowledged in *Walker IV* that finality and repose bar not only claims that were "addressed" but also claims that "should have been addressed" in the prior litigation—which would include claims that arose prior to and could have been litigated in the litigation—which contradicts their argument here that finality and repose bar only claims that were "addressed" and "previously litigated."

The Plaintiffs make various additional arguments in support of their contention that their claims are not barred by finality and repose under *Arizona II*. We now address each of these arguments in the order in which they are presented by the Plaintiffs. As shall be seen, the Plaintiffs' arguments are inconsistent with both the language and underlying rationale of *Arizona II*.

First, the Plaintiffs contend that *Arizona II* held only that "claims previously litigated" are barred by finality and repose, and that this conclusion is supported by the Ninth Circuit's decision

in *Walker IV*, which, they state, held that "these *Arizona II* principles apply to the 1936 Decree here, and the United States 'retain[ed] jurisdiction in the Nevada district court to litigate additional reserved rights in the Walker River Basin.'" MPSJ (ECF 2638) at 20, citing and quoting *Walker IV*, 890 F.3d at 1171. Thus, the Plaintiffs appear to argue that the Ninth Circuit in *Walker IV* held that, under the principles of finality and repose described in *Arizona II*, the United States "retained jurisdiction in the Nevada district court" to consider the Plaintiffs' claims for additional reserved rights. The Plaintiffs fail to note, however, that the Ninth Circuit, in the passage cited by the Plaintiffs, which appears on page 1171 of *Walker IV*, was addressing the issue of whether the Plaintiffs' claims were barred by *res judicata*, and was not addressing the separate issue of whether the Plaintiffs' claims are barred by the principles of finality and repose described in *Arizona II*, which the Ninth Circuit described later on page 1173 of *Walker IV*. Thus, the Plaintiffs appear to mix up the Ninth Circuit's ruling that the United States' claims are not barred by *res judicata* and the Ninth Circuit's later reference to the principles of finality and repose, which the Ninth Circuit did not apply and left open for this Court to apply. Although both *Arizona II* and *Walker IV* clearly differentiated between the principles of finality and repose and the principles of *res judicata*, the Plaintiffs appear to confuse the difference between these principles.

Next, Plaintiffs assert that *Arizona II* held only that principles of finality and repose prohibit retrial of "factual issues" that were previously adjudicated, and that, since the "practicably irrigable acreage" (PIA) of the reserved lands had been litigated in the earlier *Arizona I* litigation, the United States could not raise claims that would require a "recalculation of the PIA" for the omitted lands. MPSJ (ECF 2638) at 23. The Plaintiffs' argument is misplaced for two main reasons. First, the recalculation of the PIA in *Arizona II* would have occurred only if the United States were allowed to assert claims for additional reserved lands, and *Arizona II* held that the United States could not assert the additional claims because the United States "could have . . . sought" the claims in the

earlier litigation, *Arizona II*, 460 U.S. at 615, and had a "full and fair opportunity" to do so. *Id*. at 619. Thus, *Arizona II* held that the United States was not allowed to seek recalculation of the PIA because it was not allowed to assert claims for additional reserved rights that might require recalculation, since the United States could have asserted the claims in *Arizona I* but failed to do so. Thus, again, *Arizona II* did not hold that finality and repose bar only "previously litigated" claims, as the Plaintiffs contend, and instead held that finality and repose bar assertion of new claims that could have been litigated in the prior litigation.

Second, even under the Plaintiffs' own theory that *Arizona II* barred only claims that would have required recalculation of the United States' water rights under the PIA, the Plaintiffs are barred from asserting their claims for additional reserved rights here, because their claims for additional reserved rights would require recalculation of their reserved rights adjudicated in the Walker River Decree. The Walker River Decree calculated the United States' reserved right for the Tribe in the Walker River; under the calculation, the United States has the right to a continuous flow of 26.25 cubic-feet per second (cfs) of Walker River water during the irrigation season for irrigation of 2,100 acres of reservation lands, and also the right to water reasonably necessary for domestic, stock watering and power purposes to the extent previously used by the Government during the non-irrigation season—all with an 1859 priority date. The Plaintiffs argue here, however, that they should be allowed to assert claims for additional reserved rights that would require recalculation of their reserved rights adjudicated in the Walker River Decree. This is precisely what the Plaintiffs argue that *Arizona II* held that the United States could *not* do—that is, assert claims for additional reserved rights that would require recalculation of their reserved right. Thus, under the Plaintiffs' own interpretation of *Arizona II*, they are precluded from asserting their claims for additional reserved rights.

Next, Plaintiffs argue that *Arizona II* held that the United States was entitled to an "upward adjustment" of the Indians' water rights based on the practicably irrigable acreage ("PIA") of lands added to the reservation, and that *Arizona II* held that the Indians should receive increased water rights based on the PIA of the added lands. MPSJ (ECF 2638) at 24. But the Plaintiffs fail to mention that *Arizona II* held that the Colorado River Decree *expressly* provided that the quantities of water necessary to satisfy the PIA of various Indian reservations would depend on the boundaries of the reservations, some of which had not been determined and would be determined later, and that the Decree expressly provided that the quantities of water necessary to satisfy the PIA of such reservations "shall be subject to appropriate adjustment or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona II*, 460 U.S. at 630, citing Colorado River Decree, Art. II(D)(5). In other words, *Arizona II* held that the Colorado River Decree expressly did not determine the boundaries of some reservations, and thus did not determine the PIA for the reservations, and that the Court would later decide the boundary questions of the reservations and, if necessary, determine the PIA accordingly. The fact that the Colorado River Decree expressly reserved jurisdiction for the Supreme Court to later decide the boundary issues, and the related water rights issues, once the boundary issues were resolved, provides no basis for the Plaintiffs' contention that they should be allowed to assert claims for additional reserved rights under circumstances that were not authorized in the Walker River Decree.

Plaintiffs also argue that the Ninth Circuit in *Walker IV* stated that *Arizona II* "construed a water rights decree with similar jurisdictional language as retaining jurisdiction to address yet-unlitigated rights in the same waterway," such that the Decree "may properly be read as also retaining jurisdiction . . . to litigate additional rights in the Walker River Basin." MPSJ (ECF 2638) at 24-25. In the passage cited and quoted by the Plaintiffs, however, *Walker IV* was

addressing *Arizona II*'s conclusion that the United States' claims for additional water rights were not barred by *res judicata*, because the reserved jurisdiction clause of the Colorado River Decree authorized modification of the Decree. *Walker IV*, 890 F.3d at 1170-1172. The passages are not relevant to the issue here, which is whether the Plaintiffs' claims for additional reserved rights are barred by finality and repose even though they may not be barred by *res judicata*. Indeed, although the Plaintiffs cite the passages of *Walker IV* that addressed the *res judicata* issue, they pointedly avoid any mention of the later passage of *Walker IV* where the Ninth Circuit described the principles of finality and repose; in this later passage, the Ninth Circuit did not decide the finality and repose issue and instead left the issue open for this Court to decide. *Compare id*. at 1171 (discussion of *res judicata*) and *id.* at 1173 (discussion of principles of finality and repose). Thus, as before, the Plaintiffs mix up the principles of *res judicata* and the principles of finality and repose, as these principles were separately described in both *Arizona II* and *Walker IV*.

Finally, Plaintiffs assert that their interpretation of *Arizona II* is supported by the Supreme Court's later decision in *Arizona v. California*, 530 U.S. 392, 412-413 (2000) ("*Arizona III*"). MPSJ (ECF 2638) at 30-33. In fact, the Plaintiffs misconstrue *Arizona III* just as they misconstrue *Arizona II*, and for many of the same reasons. Indeed, *Arizona III*, rather than supporting the Plaintiffs' contention that finality and repose do not bar their claims for additional reserved rights, instead supports the Principal Defendants' argument that finality and repose bar the claims.

In *Arizona III*, the State defendants, citing the principles of finality and repose described in *Arizona II*, sought to reopen the Colorado River Decree to determine whether the United States was "entitled to claim additional boundary lands and, if so, additional water rights" for the lands, as such water rights were based on the PIA of the lands. *Arizona III*, 530 U.S. at 401. The Supreme Court in *Arizona III* noted, as it had noted in *Arizona II*, that the Colorado River Decree expressly provided that it was not determining the boundaries of some of the Indian reserved lands, or the

associated water rights for the lands, and that the Decree expressly reserved jurisdiction to decide the boundary issues and related water rights issues later. *Id*. at 410-411, citing Colorado River Decree, Art. II(D)(5). The Supreme Court in *Arizona III* also noted that it had refrained from deciding the boundary and water rights issues in *Arizona II*, because the Decree expressly provided that these issues would be decided later. *Id*. at 401-402. [13]

The Supreme Court in *Arizona III* then held that the State defendants were not permitted to raise the boundary and water rights issues, because they had an ample opportunity to raise the issues earlier in the litigation and had refrained from doing so. *Id*. at 408-413. Accordingly, *Arizona III* dismissed the State defendants' claims as untimely. *Id*.

The Plaintiffs argue that their claims for additional reserved rights are supported by *Arizona III*'s statement that it would not *sua sponte* consider the boundary and water rights issues that the State defendants were attempting to raise. MPSJ (ECF 2638) at 30-33. Specifically, *Arizona III* stated that the Court would decline to consider the boundary and water rights issues *sua sponte*, because the Court had not "previously decided the issue" and that to decide the issue *sua sponte* would "erod[e] the principle of party presentation so basic to our system of adjudication." *Arizona III*, 530 U.S. at 413. We fail to see how this brief passage in *Arizona III* supports the Plaintiffs' argument that finality and repose do not bar their claims. More importantly, however, *Arizona III* in this brief passage addressed only the circumstances under which the Court would review issues *sua sponte*, and not the circumstances under which finality and repose apply. Here, the defendants have timely raised the issue of whether finality and repose preclude the Plaintiffs' assertion of claims for additional reserved rights, because they raised the issue as affirmative defenses in their

[13] *Arizona III* noted that the Supreme Court had previously issued three supplemental decrees that reaffirmed the principle that the boundary and water rights issues would be decided later under the express provisions of the Decree. *Arizona III*, 530 U.S. at 398-400. The three supplemental decrees were issued in 1979, 1983 (in *Arizona II*), and 1984. *Id*.

answers to the Plaintiffs' complaints, and thus no question arises concerning whether this Court should consider the issue *sua sponte*. The Plaintiffs' contention that their finality and repose argument is supported by *Arizona III*'s out-of-context discussion of the *sua sponte* issue is utterly without merit.

In fact, *Arizona III*, rather than supporting the Plaintiffs' argument that finality and repose do not bar their claims, instead supports the Principal Defendants' argument that finality and repose indeed bar their claims. *Arizona III*, in holding that the State defendants could not raise the boundary and water rights issues because the issues had not been timely raised, quoted *Arizona II*'s statement that "while the technical rules of preclusion are not strictly applicable [in the context of a single ongoing original action], the principles upon which these rules are founded should *inform* our decision." *Arizona III*, 530 U.S. at 410 (brackets in original; emphasis added), quoting *Arizona II*, 605 U.S. at 619. *Arizona III* then stated that these traditional claim preclusion principles "rank *res judicata* an affirmative defense ordinarily lost if not timely raised." Thus, *Arizona III* held that the principles of *res judicata* that "inform" the principles of finality and repose precluded the State defendants from raising claims that they could have presented in the earlier *Arizona* litigation. By the same token, the principles of *res judicata* that "inform" the principles of finality and repose preclude the Plaintiffs from asserting claims for additional water rights that they could have raised in the prior Walker River litigation. *See, Nevada v. United States*, 463 U.S. 110, 129-130 (1983) (holding that *res judicata* bars not only claims that were actually litigated between the parties but also claims that *could have been* litigated); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876) (same). Thus, *Arizona III* reaffirms our argument that the principles of *res*

judicata "inform" the principles of finality and repose, and that these principles preclude the Plaintiffs from asserting their claims for additional rights.[14]

D. Even if the *Arizona II* Principles of Finality and Repose Apply Only to "Previously Litigated Claims," When the Claim Litigated From 1924 to 1939 Is Properly Defined, It Is the Claim Which Plaintiffs Seek to Litigate Here.

Although the Plaintiffs contend that the *Arizona II* principles of finality and repose do not apply to claims that "could" have been litigated, they agree that they apply to claims that were litigated. MPSJ (ECF 2638) at 20-30. Thus, in order to avoid those principles, they improperly and narrowly define the "claim" litigated from 1924 to 1939 as a claim to the "uninterrupted, direct flow surface water right to the Walker River associated with 10,000 acres of irrigable land within the Reservation as it existed in 1924." ECF 2638 at 25. They narrowly define the claims to be litigated here as a "storage right for Weber Reservoir," a right to "groundwater," and rights for lands added in 1928, 1936 and 1972. *Id.* at 26-30. For purposes of comparing the claim litigated from 1924 to 1939 to the "claims" the United States and Tribe seek to litigate here, we separate the claims for Weber Reservoir and for groundwater for the Reservation as it existed during the litigation, from the claims for groundwater to irrigate 1,500 acres and for stockwater on the 1936 added lands.

Although *Arizona II* did not directly and expressly define the relevant "claim" that had been litigated in *Arizona I* and which could not be litigated again, it did so indirectly. It recognized that the claim litigated in *Arizona I* was the "totality of water rights for the Reservation lands" quantified by the "practicably irrigable acreage standard." *Arizona II*, 460 U.S. at 615-617. The Court's decision there was not based upon a conclusion that the irrigability of the "omitted" lands

[14] The Plaintiffs contend that *res judicata* does not apply to "events post-dating the filing of the initial complaint." MPSJ (ECF 2638) at 32 n. 32. The Principal Defendants do not, of course, argue that the principles of finality as "informed" by *res judicata* bar litigation of claims that could not have been litigated in the original litigation, like the claims for the 1936 and 1972 lands.

"had been the very subject of the first phase of the litigation, as Plaintiffs argue. See, MPSJ (ECF 2638) at 27-28. Their irrigability had not been considered at all because they had been overlooked by the United States. The Court's decision was based upon the fact that the claim litigated had been for the totality of the Reservation's reserved water right. The Court in *Arizona II* would not have accepted an argument that the claim litigated in *Arizona I* was a claim for water for just the lands identified as irrigable, and that therefore it was acceptable to later assert a claim for the lands omitted, which is, in effect, the substance of the argument that the Plaintiffs make here.

In *Arizona II*, the Supreme Court said the principles upon which *res judicata* is founded should inform its decision on finality and repose. *Arizona II*, 460 U.S. at 619. Here, in defining the "claim" previously litigated, the Court should be informed by the same principles used under the technical rules of *res judicata* to determine whether the claim being litigated in the subsequent litigation is the same claim as was litigated in the previous litigation. That is essentially what the court did *sub silencio* in *Arizona II.* The principles used to define a "claim" for *res judicata* purposes go to the heart of the policy reasons explained by the Court in *Arizona II* for imposing principles of finality and repose to preclude the claims being made there. Those principles include a full and fair opportunity to litigate, avoidance of multiple lawsuits, conservation of judicial resources, and reliance on judicial action. *See, Arizona II*, 460 U.S. at 619-621.

Under the principles of *res judicata*, a "claim" is defined as "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments at § 24(1) (1982). The factual grouping or groupings which constitute a "transaction" is "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their

treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* § 24(2).

In emphasizing a natural grouping of operative facts, the Restatement Second definition incorporates the focus of earlier tests developed by the courts for determining identity of causes of action. *See, e.g., United States v. The Haytian Republic*, 154 U.S. 118, 125 (1894) (the "same evidence test"); *Schuykill Fuel Corp. v. B & C Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456, 457 (1929) (the "impairment of rights test"). The test developed by the Restatement, however, has the added advantage of giving express consideration to the public policy bases for finality and repose. Proper concern is given to the scarcity of judicial resources by considering whether the facts form a convenient trial unit. Equally important is the attention given to the courts' role as ultimate arbiters of disputes by examination of the expectations of the parties.

The Supreme Court has followed the Restatement approach for purposes of determining when two suits involve the same claim for purposes of determining jurisdiction of the Court of Federal Claims. *See, United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315-316 (2011). The Restatement approach is also consistent with that taken by the Ninth Circuit, to determine if two actions involve the same claim. The Ninth Circuit considers four factors: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. The last of those criteria is the most important. *See, Fund for Animals v. Lujan*, 962 F.2d 1391 (9th Cir. 1992); *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 (9th Cir. 2002).

The United States and Tribe have attempted to craft their Second Amended Complaints to avoid the obvious fact that their claims for Weber Reservoir and for groundwater for the

Reservation as it existed in 1924 arise out of the same common nucleus of operative facts as did the claim asserted in 1924. However, it is beyond dispute that the fact, date and purpose of reservation make up a claim or a cause of action for an implied reserved water right for any federal reservation, whether it be a national forest, a national monument, an Indian reservation or some other federal enclave. As the Supreme Court noted in *Cappaert v. United States*, 426 U.S. 128 (1976),

> [W]hen the Federal Government withdraws its land from the public domain [the fact of reservation], and reserves it for a federal purpose [the purpose of reservation], the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of reservation [the priority date] and is superior to the rights of future appropriators.

Id. at 138; *see also, Colorado River Water Conservation District v. United States*, 424 U.S. 800, 805 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520, 522-23 (1971); *Arizona v. California*, 373 U.S. 546, 601 (1963); *Winters v. United States*, 207 U.S. 564 (1908).

The facts essential to the claim made in 1924 and the claim being made now arose at the same time and have the same origin, *i.e.*, "the executive actions by which the Reservation was established and the intent that motivated those actions." The priority date depends on the same evidence. The essential facts relate to the same space, *i.e.*, the water is "appurtenant to the same reservation." In both cases, the claims are asserted against and are adverse to the very same water rights.

The ultimate issue under every claim for reserved water for a federal reservation is what quantity of water, if any, the United States reserved when it set aside the federal reservation. *Cf. United States v. New Mexico*, 438 U.S. 696, 698 (1978). The issue is one of implied intent, and in every case requires careful examination of both the "asserted water right" and the "specific purposes for which the land was reserved." *Id.* at 700. Only a single quantity of water is reserved.

There is no basis in law or in fact for seriatim actions each separately determining a quantity of water from surface and groundwater sources for a single reservation or a separate quantity of water for each water management facility the United States builds on a single reservation. The purpose of the Walker River Reservation and the quantity of water reserved have already been adjudicated. The facts here are not only "related in time, space, origin and motivation" to those of the 1924 litigation. They are the same.

All of the facts surrounding the creation of a Reservation therefore form the only convenient trial unit. If the United States may file seriatim actions for an implied reserved water right for each separate source of water, purpose or facility built or to be built on a single federal reservation, the problems for the arid West would multiply geometrically. No decree, including any entered here, would be reliable. The objective of an adjudication, to determine and settle water rights, would be unattainable. *See, Arizona II*, 460 U.S. at 620-621; *Green River Adjudication v. United States*, 404 P.3d 251, 252 (Utah 1965); *cf. Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11 (1976).

Therefore, it is clear that for purposes of applying the finality and repose principles of *Arizona II* here, the claim litigated from 1924 through 1939 was the claim for the Reservation's full implied reserved water right. The United States and Tribe, disappointed with the outcome of that litigation, simply seek more bites from the same apple in the form of more water from an underground source and from the Walker River to store in Weber Reservoir, a facility contemplated as early as 1914 and built during the litigation.

E. The *Arizona II* Principles of Finality and Repose Apply to the "Claim" for Weber Reservoir and the Motion for Partial Summary Judgment With Respect to It Must Be Denied.

As established above, *Arizona II* principles of finality and repose apply to "claims" that could have been litigated and to "claims" that were litigated. Here, the "claim" for water to store in Weber Reservoir is both.

In arguing that the "storage right for Weber Reservoir was not fully and fairly litigated," the Plaintiffs again fail to recognize the "claim" that was fully and fairly litigated and on which findings were made and a judgment was entered. *See*, MPSJ (ECF 2638) at 26-28. The claim that was litigated was the full implied reserved water right for the Reservation. The Plaintiffs cannot deny that any right to store water in Weber Reservoir must arise from the Reservation's implied reserved water right. The finality and repose principles of *Arizona II* cannot be avoided based upon when funds for the Reservoir were secured or when construction was begun and completed. The United States recognized, correctly, from 1924 to 1939 that the need for appropriation of funds to actually implement irrigation on a Reservation did not prevent it from asserting a claim to water under the implied reservation of water doctrine. That need does not allow the United States to split its claim for such a right based upon the level of funding in existence at the time the action was filed or tried. A reservoir is a facility for managing water, not unlike canals, ditches, headgates and the fields to be irrigated, all of which are also needed. The United States continues to recognize those facts here in asserting, for example, groundwater rights to irrigate some 1,500 acres of the 1936 added lands which, according to the expert reports of the United States, will require capital expenditures in excess of $10,000,000 to implement.

The Amended Complaint filed in 1926 confirms that the United States was not constrained in the claim it made by the presence or absence of funding to build facilities. Even though at the time of trial only about 2,000 acres on the Reservation were being irrigated, the Amended Complaint sought a water right of 150 cubic feet per second with an 1859 priority for purposes of irrigating about 10,000 acres. *See*, *Walker River*, 104 F.2d at 335, 340. Substantial additional

funding would have been needed to build the many facilities required to place all 10,000 acres into cultivation. There was no need to make a separate claim for Weber. Had the United States prevailed on its claim for 150 cfs year round, it would have had all the water it needed to fill Weber Reservoir many times over. It simply did not prevail on its claim.

The water which the United States and Tribe would store in Weber Reservoir would be used to irrigate land for which the United States has a recognized 1859 water right from the Walker River, land for which the United States may have been denied a water right by the Decree or the United States did not claim was irrigable in the 1924 to 1939 litigation. The Weber Reservoir claim is essentially directly comparable to the omitted lands claim in *Arizona II*, and the claim is barred. Certainly, the Plaintiffs are not entitled to partial summary judgment as to the finality and repose defense with respect to it.

In asserting that the storage right for Weber has not yet been litigated, Plaintiffs contend that "in the end, all parties recognized the unresolved nature of the Tribe's storage right and, by joint stipulation, added the phrase "as of the 14th day of April 1936" to Paragraph XII of the Decree in order to establish a priority date for when the right was eventually litigated."[15] MPSJ (ECF 2638) at 27. As we have shown above, the insertion of that language into the amendment to the Decree came out of the concern of the United States that Paragraph XII of the Decree standing alone would bar a claim for water to store in Weber, even if pursued under state law. *See*, Statement of Facts, Nos. 77-81. That language was inserted to meet that concern. It was not intended to protect the United States from principles of finality and repose, nor was it a stipulation to a priority date. As the Special Assistant told the Attorney General, the United States "would

[15] To the extent that the Plaintiffs contend that Exhibit 10 to the MPSJ is evidence of what may or may not have been said by Mr. Kearney, counsel to the District, to counsel for the United States, the Principal Defendants object to it. It is hearsay under the Federal Rules of Evidence for which there is no exception. *See*, Rule 801 – Rule 807 of the Federal Rules of Evidence.

not be barred for claiming a priority of April 15, 1936, at any time that it might seek such a right in the future." [Emphasis added]. *See*, Fact No. 81. It was not a recognition that there would be such a right under either state or federal law, nor was it a recognition that principles of finality and repose would not bar such a claim. For its own reasons, the United States never sought a right under state law, and never sought a right under federal law until now.

The undisputed facts show that the United States intended to assert and did assert a claim for the entire implied reserved water right for the Reservation. They show that the United States could have asserted a claim for a quantity of water to store in a reservoir. They show that the United States recognized that it could assert the entire implied reserved claim without facilities built or funded to actually put the water it sought to actual use. They show that Interior Department and Justice Department officials were of the opinion that once an implied reserved water right was recognized for the Reservation, the United States could, if it chose, use it directly, regulate it with and/or store it in a reservoir.

The undisputed facts also show that, although the United States had been considering the need for a reservoir on the Reservation since 1899, it recognized throughout, including during the litigation, that a reservoir without a recognized water right for the Reservation would be of no use. From the outset, and even as Weber Reservoir was being built, the United States pursued the full right for the Reservation under the implied reservation of water doctrine under the correct assumption that once that implied reserved water right was established, it could regulate or store water pursuant to that right in Weber Reservoir, an enlarged Weber Reservoir, or another reservoir if it chose to do so. Moreover, it was the position of the United States throughout the litigation that the water right it sought, a first right of 150 cfs, was sufficient to meet the needs of the Reservation without the need for storage.

The undisputed facts show that it was only after the United States did not receive the quantity under the implied reserved water right it was seeking, 150 cfs with an 1859 priority to irrigate all of the irrigable acres, that it became concerned about a separate "storage" water right for Weber Reservoir.

The undisputed facts show that the United States sought and received a right to water for domestic and stock water purposes in the Decree. Those facts also show that to the extent the claims asserted here for the 1918 and 1924/1928 lands were not asserted, they certainly could have been asserted. The 1918 lands were included in the 86,400 acres referenced in the 1924 Complaint.

Therefore, because those are all "claims" that could have been asserted, the *Arizona II* principles of finality and repose apply to them. Moreover, when the "claim" litigated from 1924 to 1939 is properly defined, they are part of the claim actually litigated from 1924 to 1939, just as the "omitted lands" were part of the claim litigated in *Arizona I*. Clearly, Plaintiffs' motion for partial summary judgment as to the applicability of the finality and repose defense to those claims must be denied.

F. The *Arizona II* Principles of Finality and Repose Apply to the Claim for Groundwater for the Reservation as It Existed During the Litigation and Because a Reservation Does Not Have Separate Implied Reserved Claims, One for Surface Water and One for Groundwater, the Twelfth Affirmative Defense Is Valid.

With respect to the claims being made for groundwater for the Reservation as it existed during the litigation, Plaintiffs contend that the finality and repose defense does not bar those claims. MPSJ (ECF 2638) at 28-20. They also challenge the Principal Defendants' Twelfth Affirmative Defense that a Reservation does not have two separate implied reserved claims, one for surface water and one for groundwater. MPSJ (ECF 2638) at 38-39. That defense recognizes that a Reservation's implied reserved water right may be **satisfied** in whole or in part from surface water and/or groundwater. What it contends, however, is that once a Reservation's implied

reserved right has been litigated and quantified, here from a surface water source, it cannot be **enlarged** by asserting it against the other source, here groundwater.

In contending that the Reservation's "groundwater right" has not yet been litigated, the Plaintiffs assert that this Court has explicitly found as much in 1994. They also argue it could not have been litigated because groundwater was not used by the Tribe for "irrigation" until after the Decree was entered."[16] MPSJ (ECF 2638) at 28. In contending that the Twelfth Affirmative Defense is inadequate, Plaintiffs in effect argue that they may enlarge the previously quantified implied reserved right by asserting a claim for groundwater in addition to the existing implied reserved water right. *Id.* at 38-39. We address each in turn.

Plaintiffs argue that in a 1994 Order, this Court, through Judge Reed, determined the "claim" that was litigated in the original litigation for purposes of finality and repose. Disregarding for the moment that there are no separate implied reserved claims for surface and groundwater, Judge Reed's 1994 Order was not a determination of the scope of the claim litigated from 1924 to 1939. His 1994 Order was entered in the context of a request for instructions on whether an earlier 1992 Order concerning joinder required joinder of groundwater users. *See*, ECF No. 23. That request for instructions was made before either the United States or the Tribe had asserted any claim to groundwater. Judge Reed decided that his 1992 Order did not require joinder of groundwater users. The statement in the July 8, 1994 Order that the litigation from 1924 to the Decree "did not concern itself in any way with groundwater" simply recognized that the United States had not directly sought any rights to groundwater in the original litigation. It had contended that the sole source of water was the Walker River. The Order did not determine that a claim for groundwater was not barred by principles of finality and repose.

[16] Notably, Plaintiffs are silent about uses prior to and during the litigation of groundwater for stock water and domestic purposes which are also claimed here.

The United States considered and rejected groundwater as a source of water for the Reservation prior to commencing the litigation in 1924. It alleged and the Special Master found that the Walker River was the only and sole source of water for the Reservation. See, Statement of Facts, Nos. 9; 16; 65; Doc. 7 at US0035632.

Here, the Plaintiffs claim there is an implied reserved right to groundwater for the Reservation with an 1859 priority which is separate from the implied reserved water right it sought and received in the Decree. They argue that such a groundwater right is in "addition" to its surface water rights. MPSJ (ECF 2638) at 38-39. They contend that the groundwater right may be used, among other things, to irrigate land originally reserved in and continuously held for the Tribe since 1859. They apparently contend that it may also be used for stockwater and domestic purposes, in addition to the surface water allowed for those purposes under the Decree.

Those contentions not only implicate the principles of finality and repose in *Arizona II*, they fly in the face of the *res judicata* determination made by the Supreme Court in *Nevada v. United States*, 463 U.S. 110 (1983). They do so because, regardless of any provision in a decree allowing for its modification, they require a determination that a claim for an implied reserved water right for a Reservation's surface water is an entirely separate and different claim than for an implied reserved water right for its groundwater, and could be asserted in two separate actions, and that in the second action, the United States can seek groundwater, not because available surface water is insufficient to meet its existing recognized reserved right, but because it wants to enlarge the right, even though it was denied the larger right in the original litigation. That cannot be, and is not the law.

Plaintiffs place principal reliance on *Agua Caliente Band of Cahuilla Indians v. Cochella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017). That case does not hold that a federal Reservation has separate claims or causes of action for implied reserved water rights, one for

surface water and one for groundwater, which may be asserted in separate actions brought decades apart for purposes of enlarging the existing right. It recognizes that when lands are reserved, water is only reserved to the extent necessary to accomplish the purpose of the reservation. 849 F.3d at 1268. It also recognizes that in many locations throughout the West, groundwater is the only viable water source. The Court noted that surface water in the Cochella Valley is minimal or entirely lacking for most of the year. *Id.* at 1271. In such a situation, a Reservation without an adequate source of surface water must be able to access groundwater.

The *Agua Caliente* court refers to and relies on the Arizona Supreme Court's decision in *In Re: General Adjudication of All Rights to Use of Water in the Gila River*, 989 P.2d 739 (Az. 1999). There, the Arizona court also recognized that some Reservations lack perennial streams, and depend for present or future survival substantially or entirely upon pumping of underground water. *See, Gila River*, 989 P.2d at 746. It noted that the significant question for the purpose of the reserved rights doctrine is not whether water runs above or below the ground, but whether it is necessary to accomplish the purpose or reservation. *Id.* at 747.

Here, with respect to the Reservation as it existed throughout the 1924 action, Plaintiffs again seek another bite at the apple. The implied reserved water right for the Reservation as it existed at that time was quantified by the Decree, and there was not then, nor could there be now, any assertion that there was or is inadequate surface water to satisfy it. It has been satisfied by surface water since the Decree was entered over 80 years ago. Having failed to obtain a surface water right at that time to irrigate 10,000 acres, the Plaintiffs now assert entitlement to irrigate another 1,238 acres with groundwater. They seek to enlarge the Reservation's quantified right by seeking an additional 641 acre feet of groundwater for domestic, commercial, municipal and industrial use and for stockwater, even though the existing Decree quantified the Reservation's implied reserved right to irrigate 2,100 acres of land with an 1859 priority and 26.25 cubic feet per

second of water, and for water reasonably necessary for domestic and stock watering uses during the non-irrigation season.

Plaintiffs are not entitled to partial summary judgment on the Principal Defendants' Twelfth Affirmative Defense. A federal reservation does not have separate claims for implied reserved water rights, one from surface water and one from groundwater. There is only a single claim which may be satisfied in whole or in part by either, and which must be asserted in a single action. As to groundwater for the Reservation as it existed during the litigation, Plaintiffs also are not entitled to partial summary judgment on the *Arizona II* finality and repose defense.

In fact, Plaintiffs' claims for groundwater based on the 1859 executive order that created the Tribe's reservation are barred by finality and repose because they are claims that could have been litigated in the original litigation and are simply part of the claim that was in fact litigated. The Walker River litigation adjudicated, and was intended to adjudicate, the United States' *full* reserved right for the Walker River Indian Reservation, which included reserved rights in both surface water and groundwater. Nothing in the Decree, or in the United States' complaint that initiated the Walker River litigation, suggested that the United States possessed not one but two reserved rights—one for surface water and the other for groundwater—and that the United States was asserting a reserved right claim only for the former but not the latter.

On the contrary, the United States' complaint alleged that "there is *no other source of supply of water* for the irrigation of said lands" of the reservation than the water in which the United States sought a reserved right. Since the United States represented that there is "no other source of supply of water" for the Tribe's needs than that sought by the United States in the adjudication, the United States made clear that the reserved right it sought to litigate was the United States' *entire* reserved right for the reservation. Principles of finality and repose, are a valid

defense against the Plaintiffs from now asserting a separate claim for a reserved right in groundwater apart from the existing reserved right adjudicated in the Decree.

The Supreme Court's decision in *Nevada v. United States*, 463 U.S. 110 (1983), which held that the Orr Ditch Decree, which comprehensively adjudicated water rights in the Truckee River, adjudicated the United States' *full* reserved right for the Pyramid Lake Indian Reservation supports this conclusion. *Nevada*, 463 U.S. at 129-145. As the Court held, the Orr Ditch Decree adjudicated "the full 'implied-reservation-of-water' rights that were due the Pyramid Lake Indian Reservation," and therefore the United States was precluded from asserting additional reserved rights for the reservation. *Id.* at 133. Similarly here, the Walker River Decree adjudicated the "full" implied reserved water right that was due the Walker River Reservation, and the Plaintiffs are precluded from asserting additional claims for reserved rights for the reservation, including any claimed rights in groundwater.[17]

This conclusion is also supported by the Nevada Supreme Court's decision in *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145 (Nev. 2011), which, following the decision in *Nevada*, held that the Pyramid Lake Indian tribe was precluded from asserting a reserved right for groundwater in the Truckee River basin. The Nevada Supreme Court held that—since the Orr Ditch Decree "represented 'the full implied-reservation-of-water' rights" of the Pyramid Lake Reservation, as the Supreme Court had held in *Nevada*—"the Tribe cannot assert a federally implied water right to the Dodge Flat groundwater." *Ricci*, 126 Nev. at 524 (citing and quoting *Nevada*, 463 U.S. at 133). Thus, *Ricci* held that the Orr Ditch Decree adjudicated the

[17] It is of no consequence that the Orr Ditch Decree in *Nevada* did not contain a reserved jurisdiction clause and the Walker River Decree did contain such a clause, because, as *Arizona II* held, the principles of *res judicata* "inform" the principles of finality and repose, *Arizona II*, 460 U.S. at 619, and the principles of *res judicata* bar not only claims that were actually litigated in a decree but also claims that arose prior to and could have been litigated in the decree. *Nevada*, 463 U.S. at 129-130: *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

Pyramid Lake Tribe's full reserved right in the Truckee River and precluded the Tribe from asserting a separate reserved right for groundwater. Similarly here, the Walker River Decree adjudicated the Plaintiffs' full reserved right in the Walker River and precludes them from enlarging that right by asserting a separate claim for a reserved right for groundwater.

The Plaintiffs also argue that the United States did not assert a reserved right in groundwater in the Walker River litigation as a "practical matter" because groundwater was not "used" by the Tribe until after the Decree was entered. MPSJ (ECF 2638) at 28-29. The United States has argued in other contexts, however, that – while state appropriation rights may be lost by nonuse – Indian reserved rights "generally arise from land ownership rather than use," and "are not lost through nonuse." Cohen's Handbook of Federal Indian Law (2012 ed.) ¶ 19.01 at 1205. Thus, the determinative issue under the United States' own argument is whether a right in groundwater was *reserved*, and not whether the right was *used*; if the right was reserved, the right could have been, and should have been, adjudicated in the Decree irrespective of whether the right was "used." No other water user whose rights were adjudicated in the Decree would be allowed to belatedly assert, eighty years later, a claim for an additional water right on grounds that the right was not being used, and neither should the Plaintiffs be allowed to belatedly assert such a claim.

IV. THE SEVENTH AFFIRMATIVE DEFENSE AS IT APPLIES TO THE ADDED LANDS IS NOT INSUFFICIENT AS A MATTER OF LAW.

In their Motion for Partial Summary Judgment, Plaintiffs contend that when land is added to an already existing Reservation, additional water is impliedly reserved regardless of the scope and extent of the Reservation's already existing implied reserved water right. *See*, MPSJ (ECF 2638) at 33-38. However, it is the distinction between the establishment of an Indian Reservation in the first instance, and the addition of lands to that Reservation subsequent to that establishment, which makes the Seventh Affirmative Defense a proper inquiry.

Plaintiffs distinguish *United States v. New Mexico*, 438 U.S. 696 (1978), on the basis that it does not apply because it involved the distinction between the primary and secondary uses of a Reservation. *See*, MPSJ (ECF 2638) at 34-35. The Principal Defendants are not contending that the primary/secondary distinction applies here. What they do contend is that the mere fact that land is added to an already existing Reservation does not mean that it is intended to carry with it additional implied reserved water rights without consideration of the sufficiency of the Reservation's already existing water right. Both *New Mexico* and *Cappaert v. United States*, 426 U.S. 128 (1976), make it clear that the doctrine reserves only the amount of water necessary to fulfill the purposes of the Reservation, and no more. *Cappaert* 426 U.S. at 141. Thus, it is relevant and appropriate to consider the sufficiency of the Reservation's already existing water right when considering whether additional water has been reserved. That is especially true with respect to the 1918 and 1924/1928 lands which, with respect to the 1918 lands, were considered part of the lands for which a water right was sought in the original litigation, and which, as to the 1924/1928 lands, were included before testimony was even taken in the litigation.

Plaintiffs also rely on a footnote in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), wherein the court rejected the direct application of *New Mexico's* primary purpose/secondary use analysis. Nevertheless, the court in *Adair* specifically recognized that *New Mexico* and *Cappaert* establish useful guidelines, including both the need for water to be necessary and that the Reservation includes only the amount necessary to fulfill the purpose, and no more.

Finally, Plaintiffs rely on the Ninth Circuit's decision in *Agua Caliente Band of Cahuilla Indians v. Cochella Valley Water District*, 849 F.3d 1362 (9th Cir. 2017), arguing that surface water available to a Reservation under state law is not relevant to the scope of its implied reserved water right. The Principal Defendants are not contending otherwise here. What the Principal Defendants contend is that the Court, in determining whether additional water was in fact reserved,

and if so, its extent, must also consider the scope and sufficiency of the Reservation's already existing water rights. The Principal Defendants' Seventh Affirmative Defense is not insufficient as a matter of law.

V. CONCLUSION.

The claims that the Plaintiffs assert here for storage, for groundwater and for stock water on the 1918 and 1924/1928 lands were part of the claim litigated from 1924 to 1939. Moreover, if, under the law, a Reservation may have an implied reserved right to storage, an implied reserved right to groundwater and an implied reserved right for the direct diversion of the natural flow of surface water, and that the litigation from 1924 to 1939 only involved the latter, it clearly could have involved the former.[18] The subject of using groundwater for the Reservation's reserved water right was considered and rejected. The subject of storage on the Reservation had been considered from 1899 up to and including until the decision was made to build Weber Reservoir. Both "claims" were ripe for assertion when the litigation was commenced in 1924. The "claim" for storage was ripe for assertion right up to 1932, when the United States rejected the proposal to call Weber Reservoir to the attention of the Special Master because it was concerned that it would adversely impact the quantity of water it would be awarded, which, if awarded, negated the need for storage. *See*, Statement of Facts, Nos. 57-62.

The claims for stockwater on the 1918 and 1924/1928 lands could also have been asserted. The United States' Complaint considered the 1918 lands part of the Reservation, even though not contiguous to the rest of it. *See*, Statement of Facts No. 15. The 1924/1928 lands were conditionally withdrawn before the action was commenced, and permanently withdrawn before

[18] As we have argued above, it is clear that the United States officials involved in the litigation, attorneys and Interior Department officials, believed that a storage reservoir could be built and used to regulate and manage any water right ultimately recognized, and that groundwater was not a practical water source.

testimony began. *See*, Statement of Facts, Nos. 14; 30. To the extent pleadings needed amendment, that could have been sought. The United States had amended its pleadings in 1926, and took steps to amend them again as late as 1931. *See*, Statement of Facts No. 44.

The Principal Defendants do not contend that the Third Affirmative Defense, finality and repose, applies to the claims for the 1936 and 1972 lands. They have conceded that the Fourteenth Affirmative Defense, like the Thirteenth Affirmative Defense, is inadequate as a matter of law. With those limited exceptions, the conclusions Plaintiffs ask the Court to make from their recitation of "undisputed material facts" simply cannot be made, and Plaintiffs' Motion for Partial Summary Judgment as to the Third, Seventh and Twelfth Affirmative Defenses must be denied.

Date: January 13, 2021 WOODBURN AND WEDGE

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VERIFIED STATEMENT OF GORDON H. DePAOLI

I, Gordon H. DePaoli, state under oath:

1. I am one of the attorneys in this matter for the Walker River Irrigation District.

2. In connection with their Opposition to the United States' and Walker River Paiute Tribe's Joint Motion for Partial Summary Judgment, the Principal Defendants have prepared a 4 volume appendix, which includes Exhibits 1 through 65 in support of that Opposition.

3. I caused those Exhibits to be assembled from documents produced in disclosures by the United States and by the Walker River Irrigation District in this matter.

4. I certify that the Exhibits 1 through 65 are true and correct copies of the documents as produced by those parties.

By: / s / Gordon H. DePaoli
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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 13th day of January, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record.

/ s / Holly Dewar
An employee of Woodburn and Wedge